TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted] 37.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED MARCH 11, 1907.

(20,609.)

(20,609.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 644.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Caption and parties	1	1
Bill of complaint	2	1
Order filing demurrer	8	6
Order setting demurrer for hearing	8	6
Demurrer	9	6
Order of submission	10	7
Order filing opinion	10	7
Order overruling demurrer	10	7
Opinion	11	7
Decree	21	14
Order filing petition for appeal and assignment of errors	22	15
Order allowing appeal	22	15
Order approving bond	22	15
Petition for appeal	22	15
Assignment of errors	23	16
Appeal bond	25	17
Clerk's certificate	26	18
Citation and service	27	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1907.

1 Proceedings of the Circuit Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court hall, in the City of Louisville, on Monday, October 8, 1906.

Present: Hon. Walter Evans, sitting as Circuit Judge.

No. 7102.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Be it remembered, that heretofore to wit on the 23rd day of January, A. D. 1907, came the complainants herein by Wright & McElroy their counsel, and filed in the Clerk's Office of our said court their Bill of Complaint against the above named defendant, which said Bill of Complaint is in words and figures as follows to wit:—

2 In the Circuit Court of the United States for the Western District of Kentucky.

ERASMUS L. MOTTLEY & ANNIE E. MOTTLEY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Western District of Kentucky, sitting in Equity:

Erasmus L. Mottley and wife, Annie E. Mottley residents and citizens of the Commonwealth of Kentucky, bring this bill of complaint against the Louisville & Nashville Railroad Company, a corporation created by, and existing under the laws of the State of Kentucky; and thereupon your orator and oratrix say, that said Louisville & Nashville Railroad Company is now, and was at the time hereinafter set forth, a common carrier of freight and passengers; that on the 2nd day of October, 1871, it was such common carrier of freight and passengers and owned and operated various lines of railroad extending through and across the state of Kentucky, and thence into the state of Tennessee, and into and through several other states of this Union; that said Louisville & Nashville Railroad Company was at the time aforesaid, and now is, engaged in both intra-state and inter-state commerce and business as a common carrier.

Your orators say that heretofore to wit, on September 7th 1871 they and each of them were injured by reason of a collision of trains then owned, operated and controlled by said Company, at Randolph,

in Kentucky; that said collision of said trains so operated by the defendant Company was caused by the gross carelessness and negligence of the agents and servants of the said defendant Louisville & Nashville Railroad Company, operating same; that at the time of said collision your orators were passengers upon one of said trains in said collision, so owned and operated by the defendant Company, and were at the time en route from Bowling Green to Louisville Kentucky, and paid said defendant Company the regular and customary charges for transportation from one of said points to the other; that your orators were dangerously, seriously and almost fatally injured by reason of said collision of said trains, were
3 wounded, cut and torn by reason of the destruction of the car in which they were seated at the time of the collision of said trains, and suffered great pain both physically and mentally by reason of the injuries so received by them and each of them, and they each were disabled months after receiving said injuries, from attention to their ordinary business and occupation.

Your orators say that after said collision of said trains, and after they, and each of them, had received the injuries aforesaid, they entered into a contract with the said defendant, L. & N. R. R. Co. whereby it was contracted, stipulated and agreed between your orators on the one side and said Company upon the other, that in consideration of the fact that your orators each would release said defendant Railroad Company from all damages or claim for damages for said injuries so received as aforesaid, said defendant Railroad Company agreed and obligated itself to issue passes on and over the roads of said defendant Company, and branches then existing or to exist, to your orators for the remainder of the year 1871, and thereafter to renew said passes annually during the lives of said Erasmus L. Mottley and his wife Annie E. Mottley, or either of them.

Your orators say that in pursuance to said contract and agreement and in consideration of the agreement of your orators each to release said defendant Company — did issue to each of your orators a pass over all of its lines of railroad wheresoever extended for the year 1871 and thereafter in January, of each and every year since that time, in pursuance to said contract, it issued to your orators and each of them, passes over all its lines of road and branches operated by it, up to January 1st, 1907. Up to said date the defendant Company has fully carried out and performed its said contract with your orators, said contract of date October 2nd, 1871, was on that date reduced to writing by Russell Houston the Chief Attorney for the defendant company and the same was duly signed by the defendant company through its Vice President, Thomas J. Martin, and same was acknowledged before the clerk of the Jefferson County Court and was recorded in the Clerk's office of said court: Said contract is in words and figures as follows, to-wit:

4 "Louisville & Nashville Railroad Company, Office of Attorney.

LOUISVILLE, KY., *Oct. 2nd*, 1871.

Russell Houston, Attorney:

"The Louisville & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said Railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter, to renew said passes annually during the lives of said Mottley and wife or either of them.

THOS. J. MARTIN,
For Louisville & Nashville Railroad Co.

[SEAL.] WILLIAM RAINEY, *S. E. C.*

A copy of said contract is filed herewith as part hereof, marked Exhibit No. 1.

Your orators further say that in the year 1906, the Congress of the United States passed an act entitled "An Act to Amend an Act entitled An Act to Regulate Commerce, approved Feb. 4th, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission" which was approved June 29th, 1906. That among other things, said Act provided as follows: "No common carrier subject to the *divisions* of this act shall, after January 1st, 1907 directly or indirectly issue or give any interstate Free Ticket, free pass, or free transportation for passengers etc." With certain exceptions, in which exceptions however, your orators are not embraced. "Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense on conviction shall pay the United States a penalty of not less than One Hundred Dollars, nor more than two thousand dollars, and any other persons other than the persons excepted in this provision, who uses such Interstate, Free Ticket, Free Pass, or Free Transportation, shall be subject to a like penalty * * *"

Shortly prior to January 1st, 1907, your orators each demanded of the Defendant Railroad Company that it issue to each
5 of them passes over its road and branches for the year 1907, both roads located and operated in Kentucky, and extending into other states, as said defendant company had always therefore done, and as it was bound and obligated to do by virtue of its contract and agreement aforesaid. But said defendant Company refused to issue passes to either of your orators for the year 1907, or for any other time, except passes good between points on its lines within the state of Kentucky along, which the defendant company offered to issue and deliver to your orators, but they declined to accept the same, and the defendant company refuse and still refuses

to carry out and perform its said contract with your orators so far as interstate transportation is concerned; but this refusal on its part as your orators are advised, were solely and alone based upon the ground that it was forbidden to issue your orators passes by the provisions of the aforesaid Act of Congress of the United States.

Your orators further say that said Act of Congress, if applied to your orators in the matter of their said contract with the defendant, the Louisville & Nashville Railroad Company, destroys their said contract, and impairs the defendant Company's obligation to them and deprives your orators of their property and deprives them of their rights without due process of law, and is in direct conflict with the Constitution of the United States, and especially in conflict with the 5th Amendment, of said Constitution.

Your orators further say that said contract and agreement of the defendant Railroad Company to issue passes over its lines of road and branches, as set forth in said written contract, was, and is, based upon a good and valuable consideration, in at least the sum of Ten thousand dollars, paid by your orators in their said release to the defendant company of all damages and claim for damages growing out of their said injuries, which injuries were occasioned your orators and each of them by the gross carelessness and negligence of the defendant company and its Agents and servants as aforesaid; that their rights under said contract to have said passes issued are worth, and are of the value of more than two thou-
6 sand dollars to each of your complainants; exclusive of Interest and costs and said Act of Congress without process of law or trial or adjudication of any kind, if in force, deprives your orators of their said property of the value aforesaid—which property and the right to have said passes issued has been paid for by your orators in full as shown by said contract and as heretofore stated.

Your orators further say that said Act of Congress by its terms, and upon its face, forbids all common carriers embraced in its terms from directly or indirectly issuing or giving any inter-state free ticket, free pass, or free transportation for passengers, except in certain cases, and provides a penalty for all carriers violating its provisions of not less than $100.00 nor more than $2,000.00 and also provides for a like penalty on all persons who accept or use such free pass, ticket or transportation.

Your orators say that the passes to which they are entitled under their said contract with the defendant Company are not free passes, free tickets, or free transportation within the meaning of said Act. But, as averred heretofore, your orators are entitled to said passes by reason of their said contract which is based, as stated upon a large and valuable consideration heretofore long since paid.

Your orators further say that said defendant, Railroad Company, as they are advised is willing to issue said passes as it has done heretofore, and as it is required to do by said contract, and now refuses to issue said passes solely because of the provisions of said Act of Congress. But independent of the refusal of the defendant Company to issue said passes because of the penalty provided by said Act, your

orators complain and say that said Act is unconstitutional and void because it provides a penalty against any person for receiving or using passes.

Wherefore, and for as much, as your orators and each of them, are remedyless in the premises, at and by the strict rules of the Common Law, and can have no relief only in a Court of Equity where matters of this nature are properly cognizable and reviewable and to the end therefore that the said defendant Company
7 may answer but not under oath, such oath being hereby waived according to the practice of this court, all and singular matters heretofore stated and charged as fully and perfectly as if the same were expressed, and said defendant Company thereunto particularly interrogated.

May it please your Honors to grant unto your orators a writ of subpœna directed to the said defendant Louisville & Nashville Railroad Company thereby commanding it, at a certain time, and under a certain penalty, therein named, personally to be and appear before this Honorable Court, and then and there to answer all and singular the matters aforesaid, and to stand and abide by and perform such order, direction and decree as shall be made herein as your Honors shall see meet and agreeable to equity and good conscience. And further your orators pray that said defendant Louisville & Nashville Railroad Company be required, ordered and enjoined to specifically execute said contract with your orators and each of them; that it be required ordered and enjoined to issue to your orators, and each of them, passes over all its roads owned and operated by it, in and out of the state of Kentucky, for the year 1907 and for each and every year thereafter as long as your orators each shall live; pray that said Act of Congress as to your orators and the matters hereinbefore set forth, be held not to apply or if applied that it is in violation of the Constitution of the United States and therefore null and void; pray for their costs herein expended.

And your orators will every pray, etc.

E. L. MOTTLEY,
ANNIE E. MOTTLEY,
WRIGHT & McELROY,
Solicitors for Complainants.

UNITED STATES OF AMERICA, *Western District of Kentucky:*

City of Bowling Green, Warren County, Ky., E. L. Mottley and Annie E. Mottley being duly sworn, did depose and say that said bill of complaint, and the matters therein stated and contained, are true to their own knowledge, except as the matters therein stated to be alleged on information and belief, and, as to those matters they believe the same to be true.
8

E. L. MOTTLEY,
ANNIE E. MOTTLEY.

Subscribed and sworn to before me this 21st day of January, 1907. My commission expires 8th January, 1908.

[SEAL.] GEO. WILLIS, *N. P. W. C.*

And on another day of said term of said court, to wit on the 25th day of January, 1907, came the defendant the Louisville and Nashville Railroad Company by Henry L. Stone, its counsel, and filed its Demurrer to the complainants' Bill of Complaint herein.

Came also the complainants by Wright & McElroy their counsel.

By consent, of parties, it is ordered that said demurrer be set for hearing January 26th, 1907.

The Demurrer above referred to is as follows:—

9 United States Circuit Court, Western District of Kentucky.

ERASMUS L. MOTTLEY & ANNIE E. MOTTLEY, Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Demurrer of the Louisville & Nashville Railroad Company, Defendant, to the Bill of Complaint of Erasmus L. Mottley and Annie E. Mottley, the Above Named Complainants.

This defendant the Louisville & Nashville Railroad Company by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true, in such manner and form as the same are therein set forth and allege, doth demur thereto, and for cause of demurrer showeth that the said complainants hath not in and by said bill, made or stated such a cause as doth or ought to entitle them to any such recovery or relief as is thereby sought and prayed for, from or against this defendant; wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

LOUISVILLE & NASHVILLE R. R. CO.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

HENRY L. STONE,
General Counsel for Defendant.

Louisville, January 24, 1907.

STATE OF KENTUCKY, *County of Jefferson, ss:*

M. H. Smith being duly sworn, deposes and says that he is the President of the above named defendant, the Louisville & Nashville Railroad Company. The foregoing demurrer is not interposed for delay.

M. H. SMITH.

Sworn to before me this 24th day of January, 1907.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

My commission expires Jan'y 29, 1910.

10 And on another day of said term of said court, to wit, on the 26th day of January, 1907, came the complainants by Wright & McElroy their counsel. Came also the defendant by Henry L. Stone and John E. Du Bose its counsel. This cause coming on to be heard upon the defendant's demurrer to the complainants' Bill of Complaint, and having been argued by counsel and the court not being advised thereof, takes time.

And on another day of said term of said court, to wit on the 2nd day of February, A. D., 1907, came the complainants by C. U. McElroy their counsel. Came also the defendant by H. L. Stone its counsel.

The court being now fully advised of the defendant's demurrer to the complainants' bill of complaint herein, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto, it is ordered adjudged and decreed by the court that said demurrer be and the same is hereby overruled.

The Opinion above referred to is as follows:

11 United States Circuit Court, Western District of Kentucky.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.

Opinion.

On the 2nd day of October, 1871, the complainants and the defendant entered into an agreement in writing in terms as follows:

"LOUISVILLE, KY., *Oct. 2nd,* 1871.

"The Louisville & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claim for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter, to renew said passes annually during the lives of said Mottley and wife or either of them.

"THOS. J. MARTIN,
"*For Louisville & Nashville Railroad Co.*

"WILLIS RANNEY, *Sec.*
"[SEAL.]"

This agreement was accepted by the complainants, and pursuant thereto the defendant, from its date until January 1, 1907, namely, for each of the next succeeding 35 years, issued to the complainants

the passes it thereby stipulated to issue. At the date last named, the defendant, conceiving itself bound to do so under the requirements of an Act to amend an Act entitled an Act to regulate commerce, approved Feb. 4th, 1887, and Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission, approved June 29th, 1906, refused to issue any further passes over its railroad and branches which extend into many States of the Union, but it did offer to issue free passes over so much of said railroad and branches as were located in the State of Kentucky. The complainants, contending that they were entitled under their contract to free passes over the defendant's entire railroad and all its branches wherever located and operated, declined the offer of the defendant of passes
12 limited to the State of Kentucky. The complainants have brought this suit to compel the defendant to specifically perform the stipulations of the contract, and the defendant has filed a general demurrer to the bill.

The Judiciary Act of 1887, as amended by the Act of 1888, gives the Circuit Courts of the United States original cognizance, concurrent with the courts of the several States, of suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000 and arising under the constitution or laws of the United States. (1st Comp. Stats. 508.) The interpretations by the Supreme Court of this provision, when considered in connection with the averments of the bill, leave no room for doubt that the court has jurisdiction of this action, the bill also making averments showing that the value to each of the complainants of the right sought to be enforced exceeds $2,000 exclusive of interest and costs. It is only necessary to cite in this connection the opinion of the Supreme Court in Patton *vs.* Brady, executrix., 184 U. S. 608. That opinion, with the cases referred to in it, seems to leave nothing further to be said upon the question of jurisdiction.

The contract set out in the bill was with both complainants, but no point is made by the defendant, and none need be made by the court, that their causes of action may possibly be several. The parties seem to agree that one suit is as good as two for the purpose of settling the rights involved, and we are not called upon nor required to question that conclusion, which, indeed, may be the proper one. The demurrer itself only raises the question whether the complainants or either of them should have any relief. There could be no doubt upon that proposition but for certion provisions of the Act of June 29th, 1906. The complainants had each, in 1871, been greatly injured by the negligence of the defendant, and claimed compensation and damages therefor. That claim was acknowledged by
13 the defendant, but for reasons satisfactory to the parties, the complainants agreed in lieu of money to take transportation as provided for in the contract in settlement of their claims. This form of settlement the parties had a perfect right to agree upon, and the result was the contract above set out in full. The defendant, while admitting all of these propositions, nevertheless says that it cannot longer lawfully perform its contract with the complainants

except to the extent of issuing passes over its railroad and branches in the State of Kentucky for the reason that the Act, by its first section, expressly provides that "no common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers except to its employees and their families," and many other persons, none of whom answer the description of either one of the complainants; and for the further reason that Section 2 of the said Act provides that Section 6 of the Act, to which it is an amendment shall be further amended as follows: "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

Manifestly the two provisions of the Act just copied might prohibit the making thereafter of contracts similar to the one made with the complainants in 1871, and it is insisted that as the case of the complainants is not expressly saved by any of the provisos or exceptions mentioned in Section 1 of the Act, and as the clause
14 quoted from Section two makes no exceptions, the complainants contract is destroyed and annulled by the force of those provisions. Whether this view is the correct one is the very important question to be solved while we bear in mind on the one hand that the complainants are threatened with the loss of a valuable right, and on the other that the defendant, and indeed the complainants as well, may be visited with serious criminal penalties if further performing the agreement must now be regarded as unlawful. Of course contracts like the one sought to be enforced are extremely rare—so rare that presumably they did not in fact come within the contemplation of Congress when it was perfecting Sections 1 and 2 of the Act of 1906; nevertheless the truth is that upon a highly valuable consideration the parties stipulated that for the settlement of a just and acknowledged claim for compensation for personal injuries, the defendant, in lieu of paying money, would furnish to the complainants all the transportation they wanted for themselves personally over all its lines for the full period of the natural lives of the complainants respectively. The words "free pass" as used in the contract add nothing to the controversy, for the transportation to be furnished was all paid for by the complainants, and the passes, while called "free," were in fact no more "free" than is an ordinary ticket issued to a traveler after it has been paid for in cash. Did Congress intend to abrogate such previously made contracts founded upon valuable and legitimate considerations? Certainly it did not say so. Was the abrogation of such pre-existing contracts within the policy of the legislation referred to? There

is nothing to indicate that it was, although it is obvious that contracts of a similar nature could not be made after the Act became effective. Was it the policy of Congress to annul any previously made contract founded upon good consideration? Except through the bankruptcy act it is difficult to reach the conclusion that Congress ever passes an act designed to impair the obligation
15 of any contract theretofore lawfully and fairly made upon valuable consideration. True Congress is not, although the States are, prohibited by the Constitution from passing any law impairing the obligation of contracts, but there is a moral obligation and stress upon Congress not lightly to do so, which we believe always is as effective upon that body and its conscience as would be a constitutional inhibition. If these propositions be true, then we should construe the Act as containing an exception to the general language used, and hold that the issuing of the free passes provided for in the contract was not meant to be prohibited by the statute. Do the authorities justify us in doing this? The question is one of interpretation, and in our efforts to solve it we may bring to our aid certain well established rules of construction.

Our Blackstones taught us the lesson which Endlich, in Section 25 of his work on The Interpretation of Statutes, has amplified. He says, "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life would have been liable to punishment."

In the case of Estate of Ticknor, 13 Michigan 51, the Supreme Court of that State said "Legislatures, like courts, must be considered as using expressions concerning the thing they have in mind; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of."

In Jefferys *vs.* Boosey, 4 H. L. 815, the House of Lords
16 laid down the rule that "general words do not always extend to every case which literally falls within them."

Outside and unthought of facts and circumstances may develop latent ambiguity when the literal words of a statute come to be considered in connection with them, and in such cases the courts must interpret the language of the statute without losing sight of those facts, especially when a retroactive operation of the statute might destroy vested rights or otherwise work gross and possibly irremediable injustice altogether without such results having been within the contemplation of the legislative body.

Unquestionably in this case the first matter for consideration is the intention of Congress. That general intention cannot be misconceived nor misunderstood. It was, under the commerce clause of the

Constitution, to regulate the rates which common carriers engaged in interstate commerce were to charge and receive for the carriage of property and passengers in such commerce. The details of the Act were arranged for the purpose of effectuating that general intention. Hence the provisions which have been copied above. In terms there is no clause in the Act which would except agreements like the complainants from the control of those provisions. Yet complainants had already in 1871 paid in full for the transportation their contract calls for, and that payment had then imposed upon the defendant the legal obligation to carry complainants as passengers over its railroad and all its branches at any time they or either of them desired to travel thereon during their respective lives. Notwithstanding the general purpose of the Act and notwithstanding the general language used therein must we conclude that Congress intended to deal with the very unusual case of contracts like that with the complainants, whereby they had already con-
17 tracted and paid for their own transportation as passengers over defendant's lines? Complainants, by paying for it, had acquired a vested right, certainly as between them and the defendant, to the thing the latter contracted to deliver. Under these circumstances is it fairer or more nearly right to assume that Congress meant to destroy this vested right without requiring the defendant to reimburse to complainants the money potentially paid for the service than it is to assume that Congress meant to do no such unjust and unnecessary thing even by the general language of the Act. The invalidation of the complainants' contract would have no appreciable effect upon the general operations of the Act, and would, therefore, be practically as unnecessary as it would be unjust. Such invalidation could be justified upon no principle which would aid in the general purposes of the legislation, but would be the wanton infliction of an unnecessary wrong. We are unwilling, therefore, to impute to Congress a deliberate intention of that character, and we believe the authorities justify this reluctance.

In United States *vs.* Kirby, 74 U. S. (7 Wall.), at page 486-7, the Supreme Court laid down this general rule: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will also, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over its letter."

In Carlisle *vs.* United States, 16 Wallace 153, the Court thus stated the proposition: "All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of this character."

This familiar rule was again re-affirmed in practically the
18 same language in Chew Heong *vs.* United States, 112 U. S. 555.

In Market Co. *vs.* Hoffman, 101 U. S. 116, the court stated a kindred rule as follows: "In Brewer's lessee *vs.* Blogher (14 Pet. 78) it was said to be the undoubted duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it."

In Knowlton *vs.* Moore, 178 U. S. 77, the court said: "We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

It may also be appropriate and applicable to say that in Cook *vs.* United States, 138 U. S. 181, the court stated it to be a "settled rule that the courts uniformly refuse to give to statutes a retrospective operation, where the rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature."

In the case before us the statute, if literally construed, would have a manifestly retrospective operation upon the contract by annulling what had become valid over 35 years ago, and which had been acted upon by the parties for that entire period. Certainly the statute in this case does not by any language used therein clearly or expressly indicate that such contracts were intended to be affected by its provisions, and we conclude, upon the authorities cited and upon all the considerations we have suggested, that the Act of June 29th, 1906, should be construed precisely as if, in its general language, there was an express exception excluding from its operation the complainants' contract. The authorities clearly au-
19 thorize the court to so construe it. In no other way can the vested contract rights of the complainants be preserved. In no other way could gross injustice be avoided, especially as no way to reimburse or compensate the complainants is provided. In so construing the Act we proceed upon established principles, and do no violence to the general policy of Congress—imputing to it as we do the intention to deprive no one of rights lawfully acquired and vested long before June 29th, 1906.

The case of Railroad Company *vs.* Richmond, 19 Wallace 584, is not strictly analogous, but certain parts of the opinion of the court delivered by Mr. Justice Field may throw additional light upon the subject. Speaking of the acts of Congress then under discussion the court, at page 589, said:

"They were not intended, even if it were competent for Congress to authorize any such proceeding, to invade the domain of private contracts, and annul all such as had been made on the basis of existing legislation and existing means of interstate communication. Contracts valid when made, continue valid, and capable of enforcement, so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creating.

"The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

In Addyson Pipe and Steel Co. *vs.* United States, 175 U. S., at page- 233-5, the court had occasion to distinguish that case from the Richmond case, but did not allude to the fact that the contract in the case then before it was made in 1894, long after the Anti-Trust Act, which the court was considering, was passed in 1890. That contract was in plain violation of the law then in force, just as Mottley's contract, if made now, might be in violation of the Act of June 29th, 1906, and the general words used by the court (as it often reminds us) are to be applied to the exact case before it. Besides, in the Addyson Pipe Co. case the contract was by no means based upon a valuable consideration actually paid before the prohibiting law was enacted, but was simply an agreement based upon mutual promises to form an unlawful combination. For these reasons we conclude that there is nothing in the Addyson Pipe Co. case that overrules or conflicts with any of the cases which we have cited in support of the construction we have given to the Act of June 29th, 1906.

We have been cited to certain cases which deal with the power of Congress or State legislatures to enact laws which make it unlawful, and therefore legally impossible, to perform certain classes of agreements which were lawful when made. But we take it that in all such cases the legislative intent to reach and to override existing agreements, particularly if valuable property rights have thereunder become vested, must be very clear and unmistakable. As no such intent is expressly or clearly shown in the Act of 1906, if indeed such intent be shown in the least degree, the cases cited by counsel are not persuasive, especially as the nature of the agreements then in contention, and whether they were based upon valuable considerations already paid by one party and received by the other, was not clearly shown at the argument.

At all events, we have reached the conclusion that if the averments of the bill are true, the complainants are entitled to relief in equity, it being quite apparent from the nature of the case and from the uncertainty of human life that a remedy at law would not be plain, or complete, and certainly not so adequate as would be a specific performance, which, if had, will meet the exact justice and right of the case, while an action for damages for a breach of the contract, even if maintainable, might not do so, inasmuch as one would be based upon the exact lifetime of each complainant, while the other could only be estimated upon mere life probabilities.

The demurrer will be overruled.

WALTER EVANS, *Judge.*

And on another day of said term of said court, to wit, on the 16th day of February, 1907, the following proceedings were had:—

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

No. 7102.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Decree.

The complainants Erasmus L. Mottley and Annie E. Mottley, appeared by C. U. McElroy their counsel and the defendant Louisville & Nashville Railroad Company by Henry L. Stone, its counsel and thereupon the defendant announced that it elected to stand by its demurrer to the bill of complaint which was overruled on February 2nd, 1907, and refused to answer or plead further and consented that this cause be now heard upon the bill of complaint and exhibit and the court being sufficiently advised, it is now ordered, adjudged and decreed that the complainants Erasmus L. Mottley and Annie E. Mottley, a/e entitled to a specific performance of the contract filed with the bill of complaint of date October 2, 1871, and that they and each of them are entitled to transportation or passes over the defendant's railroad and all its branches wherever located and now existing, or which may hereafter exist, for and during the respective lives of the complainants and without other payment for said transportation or passes than has been heretofore made by the complainants, as shown by said contract of October 2nd, 1871; and it is further ordered, adjudged and decreed that the defendant Louisville & Nashville Railroad Company do issue to each of the complainants, Erasmus L. Mottley and Annie E. Mottley, passes for the year 1907, over defendant's railroad and all its branches wherever existing and also like passes ever- year thereafter at the beginning thereof, as long as complainants or either of them shall live, according to the terms of said contract of October 2nd, 1871, it being considered and adjudged by the court that the Act of Congress entitled "An Act to amend an Act, entitled an Act to regulate Commerce, approved Feb. 4th, 1887, and Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, does not forbid the defendant company from issuing, nor the complainants from accepting and using, the passes which are ordered and decreed herein shall be issued to the complainants. It is further ordered, adjudged and decreed that the defendant company shall pay the cost of this case.

22 United States Circuit Court, Western District of Kentucky.

SATURDAY, *March* 9, 1907.

ERASMUS L. & ANNIE E. MOTTLEY
vs.
LOUISVILLE & NASHVILLE R. R. Co.

This day came the defendant Louisville & Nashville Railroad Company by Henry L. Stone, its counsel and presented to the court its Petition for Appeal and Assignment of Errors, which are filed and in consideration thereof, it is ordered that said Petition for Appeal and Assignment of Errors be and they are hereby granted to have reviewed in the Supreme Court of the United States, the decree and proceedings entered and had here, upon said defendant giving bond according to law in the sum of One hundred and fifty dollars ($150.00) which bond shall not operate as a supersedeas; thereupon said defendant presented said bond with Charles A. Lutz as surety, which bond is now approved and ordered to be filed.

The Petition for Appeal above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, Western District of Kentucky.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition for Appeal to the Supreme Court of the United States.

The above named defendant, conceiving itself aggrieved by the decree made and entered on the 16th day of February, 1907, in the above styled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY L. STONE,
Solicitor for Defendant and Appellant.

23 The Assignment of Errors above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, for the Western District of Kentucky.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY, His Wife, Complainants,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Assignment of Errors.

The above named defendant and appellant, Louisville & Nashville Railroad Company, hereby petitions for an appeal, and assigns errors on the decree of the Circuit Court of the United States for the Western District of Kentucky, in the above entitled cause, dated on the 16th day of February, 1907, in the following particulars:

First. Because said court erred in the ruling made by it overruling the defendant's demurrer to complainants' bill of complaint.

Second. Because said court erred in its rulings that the contract between the complainants and defendant dated October 2, 1871 a copy of which is made Exhibit No. 1 with the bill of complaint, and the specific performance of which is prayed for by complainants is valid, or binding in law on this defendant with respect to interstate transportation of complainants over the railroads of this defendant since the Act of Congress to amend "The Act to regulate Commerce," approved June 29, 1906, went into force and effect.

Third. Because said court erred in ruling that, under said contract, complainants were lawfully entitled to receive from defendant during their lives interstate transportation free or without charge and use the same over all or any of the lines of railroad owned and operated by defendant as a common carrier of passengers from one state to another state or other states of the United States, and that defendant by said contract was la-fully bound to grant for the year 1907, and annually hereafter, at the beginning of each year, such transportation to complainants as long as they or either of them lived notwithstanding the provisions of Section 1 of said Act as amended forbidding the issuance of such transportation free or without charge to complainants or either of them on or after January 1, 1907.

Fourth. Because said court erred in decree- the specific enforcement of said contract of October 2, 1871, between complain-
24 ants and defendant, with respect to interstate transportation of complainants, and that defendant from year to year furnish such transportation to them as long as they lived, although the provisions of Section 6, of said Act as amended, which took effect on August 28, 1906, expressly prohibits, under heavy penalties, the defendant as such common carrier from charging, demanding, collecting or receiving a greater or less or *different* compensation for such transportation of passengers or for any service in connection

therewith between the points named in the defendant's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said Act.

Fifth. Because said court erred in ruling that the contract sued on had not been abrogated or nullified by the provisions of said Act of Congress, approved June 29, 1906, such contracts not having been excepted from the operation of the provisions aforesaid, and in ruling that said Act should be construed as though it contained an express exception exclusing from its operation the contract between complainants and defendant sued on.

Sixth. Because said court erred in ruling that complainants were entitled to any relief whatever against defendant by virtue of the contract aforesaid.

Seventh. Because said court erred in not sustaining defendant's demurrer to the complainants' bill of complaint, and in not dismissing the same at complainants' costs.

Wherefore, defendant prays that the said decree be reversed.

HENRY L. STONE.
Solicitor for Defendant and Appellant.

25 The Bond above referred to is as follows:

Circuit Court of the United States, Western District of Kentucky.

ERASMUS L. MOTTLEY and ANNIE E. MOTTLEY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Know all men by these presents, that we Louisville & Nashville Railroad Company principal and Charles A. Lutz, Surety, are held and firmly bound unto Erasmus L. Mottley and Annie E. Mottley in the sum of One hundred and fifty dollars, to be paid to the said Erasmus L. Mottley and Annie E. Mottley, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of March, A. D., 1907.

Whereas the above named Louisville & Nashville Railroad Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the Decree rendered in the above entitled suit, by the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named Louisville & Nashville Railroad Company, shall prosecute its said appeal to effect, and answer all costs, if it shall

fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHAS. A. LUTZ. [L. S.]

Sealed and delivered in presence of
A. G. RONALD.

Approved Mch. 9, 1907.
WALTER EVANS, *Judge.*

26 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 26 pages contain a true and correct transcript of the record and proceedings had in the case of Erasmus L. Mottley and Annie E. Mottley against Louisville & Nashville Railroad Company as the same appears from the files and records in my said office.

Witness my hand and seal of said court, this 9th day of March, A. D., 1907.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

A. G. RONALD, *Clerk.*

27 644, 20609.

UNITED STATES OF AMERICA,
Western District of Kentucky, Sixth Judicial Circuit, ss:

To Erasmus L. Mottley & Annie E. Mottley, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the * 30th day of March next, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, wherein Louisville and Nashville Railroad Company is appellant and you are appellees, to show cause, if any there be, why the Decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of March in the year of our Lord one thousand nine hundred and Seven, and of the Independence of the United States of America the one hundred and thirty-first.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

WALTER EVANS, *Judge.*

---

*Not exceeding 30 days from the day of signing.

The above citation is accepted, this March 11th, 1907.

CLARENCE U. McELROY,
Solicitor for Appellees.

Endorsed on cover: File No. 20,609. W. Kentucky C. C. U. S. Term No. 644. Louisville & Nashville Railroad Company, appellant, *vs.* Erasmus L. Mottley and Annie E. Mottley, his wife. Filed March 11th, 1907. File No. 20,609.

Office Supreme Court, U. S.
FILED.
MAR 18 1907
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. [redacted] 37.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - Appellant,

vs.

ERASMUS L. MOTTLEY AND
ANNIE E. MOTTLEY, HIS WIFE, - - - - - - - - Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, SIXTH CIRCUIT, FOR THE WESTERN DISTRICT OF KENTUCKY.

NOTICE, MOTION AND GROUNDS OF APPELLANT TO ADVANCE FOR HEARING.

HENRY L. STONE,
Solicitor for Appellant.

P. C. HUNNEMACHER PRESS, LOUISVILLE, KY

Supreme Court of the United States.

OCTOBER TERM, 1906.

No.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - *Appellant*,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE, - - *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, SIXTH CIRCUIT, FOR THE WESTERN DISTRICT OF KENTUCKY.

NOTICE.

To Mr. Clarence U. McElroy, Solicitor for Appellees:

Please take notice that I shall make a motion for appellant in the above styled case before the court at the opening of its session on Monday, March 18, 1907, or as soon thereafter as counsel can be heard, to advance the above styled case for hearing at the present term at such time as the court may direct, and in support of said motion will file and present to the court at the hearing of said motion the grounds therefor, a copy of which motion and grounds is herewith served upon you, dated March 11, 1907.

HENRY L. STONE,
Solicitor for Appellant.

Service of above notice is accepted and the motion to advance assented to, this March 11th, 1907.

CLARENCE U. MCELROY,
Solicitor for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1906.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Appellant*,

vs.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE, - - - - *Appellees*.

MOTION AND GROUNDS OF APPELLANT TO ADVANCE FOR HEARING.

And now comes the appellant and moves the court to advance this case for hearing at the present term, on the following grounds, to-wit:

1. This case was brought in equity by appellees in the court below to compel the specific performance of the following contract made and executed between them and appellant:

"LOUISVILLE, KY., Oct. 2, 1871.

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said Company from all damages or claim for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now

existing or to exist, to said E. L. and Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

"THOS. J. MARTIN, Vice President,
"*For Louisville & Nashville Railroad Company.*
"WILLIS RANNEY, Secretary."
(Seal.)

This contract was complied with by appellant until January 1, 1907, and then it refused further compliance because of the provisions of the amendatory act of Congress to regulate commerce, approved June 29, 1906, which (1) by Section 1 prohibits on or after January 1, 1907, a common carrier by railroad, engaged in the transportation of passengers or property from one State to another, such as appellant, from issuing free interstate transportation, and (2) by Section 6 prohibits on or after August 28, 1906, when said act took effect, such carrier from receiving a greater or less *or different* compensation for such transportation of passengers between the points named in such carrier's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said act.

2. Appellees contend that said act to regulate commerce does not apply to contracts made prior to its passage and approval, but, if it does, it is unconstitutional, because it deprives them of their property, without due process of law, while, on the other hand, appellant insists that said act applies to all such contracts in conflict with its said provisions, whether executed before or after the taking effect of said act, and that said application does not render said act unconstitutional, it being within the power of Congress to so regulate commerce among the States as to impair the obligation of prior contracts respecting such commerce.

3. The court below ruled that the contract aforesaid had not been abrogated or nullified by said act of Congress, although not excepted from its operation, and that said act should be construed as though it contained an express exception, excluding from its operation the said contract between appellant and appellees.

4. The Interstate Commerce Commission and many courts have ruled otherwise, and as the common carriers subject to the provisions of said act have made a large number of similar contracts, both as to interstate transportation of freight and passengers, and are uncertain whether they are still in force or not, it is exceedingly important to all of them, to the said Commission whose duty it is to enforce the provisions of said act, to those holding such contracts with such carriers, and to the public at large, to have the questions involved herein promptly and finally determined by this court.

5. In pursuance of its opinion and order overruling appellant's demurrer to appellees' bill, the court below decreed the specific performance of said contract, and that appellant should issue to appellees a pass for interstate transportation, good over all or any of the lines of railroad owned or operated by appellant as a common carrier of passengers from one State to another State or other States of the United States for the year 1907, and annually thereafter, at the beginning of each year, as long as they or either of them lived, the appellant having declined to plead further. This appeal is taken to reverse that decree.

6. This is a case within sub-divisions 4 and 5, Section 5 of the Judiciary Act of March 3, 1891 (4 Fed. Stats. Anno., 398), and "involves the construction or the application of the Constitution of the United States," and "in which the constitutionality of a law of the United States is drawn in ques-

tion," wherein the appeal from the Circuit Court lies direct to this court. (American Sugar Refining Co. vs. New Orleans, 181 U. S. 277; Huguley Manfg. Co. vs. Galeton Cotton Mills, 184 U. S. 295.) A case arises under the Constitution of the United States when the right of either party depends on the validity of an Act of Congress, which is the fact in this case. (Patton vs. Brady, executrix, 184 U. S. 608.)

HENRY L. STONE,
Solicitor for Appellant.

APR 27 1908
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM 1907

No. 37.

Louisville & Nashville Railroad Company, Appellant

v.

Erasmus L. Mottley and
Annie E. Mottley, his Wife, - - Appellees

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANT

HENRY LANE STONE,
Solicitor for Appellant.

CRUMP & CARTER PRINTING CO., LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM 1907.

No. 252.

Louisville & Nashville Railroad Company, - Appellant

vs.

Erasmus L. Mottley and
Annie E. Mottley, his Wife, - - - - Appellees

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANT

STATEMENT.

This case was brought in equity in the court below by appellees, Erasmus L. Mottley and Annie E. Mottley, his wife, to compel the specific performance of the following writing, executed and delivered to them at its date by Thomas J. Martin, Vice President of the appellant, Louisville & Nashville Railroad Company, to-wit:

> LOUISVILLE, KY., Oct. 2, 1871.
>
> The Louisville & Nashville Railroad Company, in consideration that E. L. Motley and wife, Annie E. Mottley, have this day released said Company from all damages or claim for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson county, Ky., hereby agrees to issue free passes on

said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

THOS. J. MARTIN, Vice President,
Louisville & Nashville Railroad Company.

Willis Ranney, Secretary.
(Seal.)

This obligation was complied with by appellant until January 1, 1907, and then appellant refused further compliance therewith, so far as free interstate transportation was concerned, because of the provisions of the amendatory act of Congress to regulate commerce,approved June 29, 1906, which (1) by Section 1 prohibits on or after January 1, 1907, a common carrier by railroad engaged in the transportation of passengers or property from one State to another, such as appellant, from issuing free interstate transportation with certain exceptions, in none of which can appellees be classed; and (2) by Section 6 declares that no such carrier shall "charge, or demand, or collect, or receive a greater or less or *different* compensation for such transportation of passengers, or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The violation of said provision of Section 1 of said Act is by a further provision of that Section made a misdemeanor punishable by "a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted by this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

The violation of the provisions referred to contained in Section 6 of said Act is also made a misdemeanor punishable by "a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

The bill of appellees (R., 3) shows that they demanded of appellant the issuance of passes to them, for the year 1907 over its road and branches, located and operated in Kentucky and extending into other States, as appellant had theretofore done, but appellant refused to do so, except passes good between points on its lines within the State of Kentucky alone, which appellant offered to issue and deliver to appellees, but they declined to accept the same. The refusal to issue to appellees interstate free passes the bill admits (R., 4) was based on the ground that appellant was forbidden to issue passes for such transportation by the provisions of the aforesaid Act of Congress, but appellees averred that if said Act is applicable to their said contract with appellant, it impaired its obligation, and deprived them of their property and rights without due process of law, and thus violated the Constitution of the United States, especially the Fifth Amendment thereof. The appellees further alleged that their rights under said contract to have such passes issued during their respective lives were worth and of the

value of more than $2,000 to each of them, exclusive of interest and costs.

The relief prayed for was that on final hearing appellant be required, ordered and enjoined to specifically execute said contract with appellees and each of them; to issue to them and each of them passes over all its roads owned and operated by it, in and out of the State of Kentucky, for the year 1907, and for each and every year thereafter as long as they and each of them shall live; and that said Act be held, as to them and the matters set forth in their bill, not applicable, or, if applicable thereto, that it is in violation of the Constitution of the United States, and, therefore, null and void. (R., 5.)

Appellant filed a general demurrer to the bill (R., 6), which, after argument of counsel, was overruled. (R., 7.)

In passing on this demurrer, the court below on February 2, 1907, delivered an opinion in writing, of considerable length (R., 7-13), which has been reported. (Mottley et ux. v. Louisville & Nashville R. Co., 150 Fed., 406-413.)

Subsequently, on February 16, 1907, appellant's counsel, having elected to stand by the demurrer to the bill, and declined to answer or plead further, the court below entered a final decree granting to appellees the relief prayed for. (R., 14.) Thereafter, on March 9, 1907, appellant presented to the court below its petition for appeal and assignment of errors, which were granted, to have reviewed by this court the decree and proceedings aforesaid, upon the execution of a bond according to law, which was done, but the same was not to operate as a supersedeas. (R., 15.) Citation was duly accepted by appellees' counsel, and the transcript of the record was

filed in the clerk's office of this court March 11, 1907.

The errors assigned by appellant are as follows (R., 16-17):

ASSIGNMENT OF ERRORS.

The above named defendant and appellant, Louisville & Nashville Railroad Company, hereby petitions for an appeal, and assigns errors on the decree of the Circuit Court of the United States for the Western District of Kentucky, in the above entitled cause, dated on the 16th day of February, 1907, in the following particulars:

First. Because said court erred in the ruling made by it overruling the defendant's demurrer to complainants' bill of complaint.

Second. Because said court erred in its rulings that the contract between the complainants and defendant dated October 2, 1871, a copy of which is made Exhibit No. 1, with the bill of complaint, and the specific performance of which is prayed for by complainants, is valid, or binding in law on this defendant with respect to interstate transportation of complainants over the railroads of this defendant since the Act of Congress to amend "The Act to Regulate Commerce," approved June 29, 1906, went into force and effect.

Third. Because said court erred in ruling that, under said contract, complainants were lawfully entitled to receive from defendant during their lives interstate transportation free or without charge, and use the same over all or any of the lines of railroad owned and operated by defendant as a common carrier of passengers from one State to another or other States of the United States, and that defendant, by said contract, was lawfully bound to grant for the year 1907, and annually hereafter, at the beginning of each year, such transportation to complainants as long as they or either of them lived, notwithstand-

ing the provisions of Section 1 of said Act as amended forbidding the issuance of such transportation free or without charge to complainants or either of them on or after January 1, 1907.

Fourth. Because said court erred in decreeing the specific enforcement of said contract of October 2, 1871, between complainants and defendant, with respect to interstate transportation of complainants, and that defendant, from year to year, furnish said transportation to them as long as they lived, although the provisions of Section 6, of said Act as amended, which took effect August 28, 1906, expressly prohibits, under heavy penalties, the defendant as such common carrier from charging, demanding, collecting or receiving a greater or less or *different* compensation for such transportation of passengers, or for any service in connection therewith, between the points named in the defendant's tariffs published and filed with the Interstate Commerce Commission, in accordance with the provisions of said Act.

Fifth. Because said court erred in ruling that the contract sued on had not been abrogated or nullified by the provisions of said Act of Congress, approved June 29, 1906, such contracts not having been excepted from the operation of the provisions aforesaid, and in ruling that said Act should be construed as though it contained an express exception excluding from its operation the contract between complainants and defendant sued on.

Sixth. Because said court erred in ruling that complainants were entitled to any relief whatever against defendant by virtue of the contract aforesaid.

Seventh. Because said court erred in not sustaining defendant's demurrer to the complainants' bill of complaint, and in not dismissing the same at complainants' costs.

Wherefore, defendant prays that the said decree be reversed.

ARGUMENT.

I.

JURISDICTION.

The jurisdiction of the court below is not questioned by appellant. This case appears to be within sub-divisions 4 and 5, Section 5, of the Judiciary Act of March 3, 1891 (4 *Fed. Stats. Anno.* 298), and "involves the construction or the applicaton of the Constitution of the United States," and is an action "in which the constitutionality of a law of the United States is drawn in question." So it is claimed the appeal from the Circuit Court lies direct to this court. (*American Sugar Refining Co. vs. New Orleans*, 181 *U. S.*, 277; *Hugulcy Manfg. Co. vs. Galeton Cotton Mills*, 184 *U. S.*, 295.) This court has held that a case arises under the Constitution of the United States when the right of *either* party depends on the validity of an Act of Congress, which is true in this case. (*Patton vs. Brady, executrix*, 184 *U. S.*, 608.)

II.

FREE PASSES.

Whatever may be said of the character of transportation provided for in the writing sued on, it is denominated therein by appellant "free passes," and was accepted by appellees as properly denominated by that term. Furthermore, so far as such passes covered interstate transportation, appellees accepted said instrument with full knowledge that it was within the power of Congress to so regulate such transportation as to prevent

its issuance at any time under the commerce clause of the Constitution of the United States. If appellees have been deprived by Congress, in the exercise of its said power, of the use of such transportation over the lines of appellant, they have not been deprived of their property, without due process of law, within the meaning of the Fifth Amendment, as claimed by them, nor does the passage of the Act to regulate commerce or the amendment thereto of June 29, 1906, impair the obligation of the contract between appellant and appellees; but, even if such were the case, it is entirely within the power of Congress to do so, as the impairment complained of is merely an incident to such legislation.

The object of the Act of June 29, 1906, was to prevent discrimination, and to place all passengers and shippers on the same level, with equal rights and privileges when traveling or shipping property over the lines of interstate common carriers by railroad, and to require all alike to pay passenger and freight rates and fares between the same points fixed in the schedules filed by the carriers, subject to said Act, with the Interstate Railroad Commission, without preference, discrimination or exception or regard to prior contracts or other arrangements.

While Congress may not pass an Act for the purpose of impairing the obligation of contracts, it may, in the due exercise of the powers expressly conferred upon it, incidentally do so.

In *Knox v. Lee* and *Parker v. Davis Legal Tender Cases*), 12 *Wallace,* 550-51, this Court said:

If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering, is the argument pressed upon us that the Legal Tender Acts were prohibited by the spirit of the Fifth Amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse Act, or an embargo be enacted, or a war be declared?

In *Bullard v. Northern Pac. R. Co.*, 45 *Am. & Eng. R. Cases*, 234, 11 *L. R. A.*, 246, the Supreme Court of Montana held that a shipper could not recover rebates stipulated for in a contract in violation of the second section of the Interstate Commerce Act, although the contract was entered into *prior* to the passage of that Act. The Court, after quoting liberally from the decisions of the Supreme Court of the United States relative to the power of the States to regulate the charges of public service corporations, said (pp. 242-43):

> The liberal quotations from these opinions show clearly the grounds upon which legislation similar to the provisions of the Act of Congress under examination are based, and also the limitations which have been sometimes placed upon the law-making power in this regard. Counsel in their briefs have not pointed out, and we have been unable to find, any case in which a contract like that in the complaint has been protected from the operation of a statute which fixed penalties for an unfair discrimination by railroad companies in their tariffs for carrying freight. We think that the significance of this fact can be easily understood, when we inquire into the authority for this species by legislation by the States.

Again in the same case the court said (p. 245):

> There is an old rule of law which can be invoked and applied to the case at bar. In Atkinson v. Ritchie, 10 East, 530, Lord Ellenborough, C. J., said in the opinion: "That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law, at the time, has become illegal in virtue of some subsequent law,

> are propositions which admit of no doubt." Professor Pomeroy writes: "An illegal contract is, as a rule, void, not merely voidable, and can be the basis of no judicial proceedings. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by a subsequent statute." Cont. sec. 280.

In 8 *Cyc., at Page* 997, it is said:

> It is observable that individuals must necessarily contract with full knowledge that the legislature may draw at any time from the vast reservoir of power, defined and undefined, intrusted to it. Legislation which can properly be referred to this great fund of authority, however nearly it may affect the contract in question, is not invalid.

In *Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee*, 109 *Ky.*, 408, the Kentucky Court of Appeals held that the performance of a contract to give certain rates was not rendered impossible by the passage of the long and short haul law, as the railroad company might change its other rates so as to make the contract rate legal, but the court recognized the principle for which we are contending. In an opinion by Judge Burnam, the Court said (pp. 418-19):

> The effect of changes in the statutes upon the rights of parties, under existing contract, is clearly stated in the Am. & Eng. Ency. of Law, volume 10, page 182, 1st edition. It is as follows: "If subsequently to the making of a contract a statute is en-

acted which makes the performance of the contract unlawful, a legal impossibility supervenes which releases the promisor from his obligation; but if the performance of the obligation is rendered merely more burdensome or expensive, the enactment of the statute creates no such impossibility as will excuse the obligor."

It is apparent that by this change in the organic and statutory law either appellant or appellee was bound to suffer, but there is nothing in either provision which makes the performance of the contract a legal impossibility. It is true that its performance is rendered more burdensome and expensive to appellant, but this does not result from any failure or non-performance on the part of appellee of their part of their agreement.

The Court's attention is called to the case of *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 59 *N. W.*, 862-63, decided by the Supreme Court of Nebraska, June 26, 1894, where it was held that the Act of Congress, entitled "An Act to Regulate Commerce," when it took effect, abrogated all existing contracts with common carriers for special interstate commercial rates, and specially vested in the Federal tribunals described in that Act exclusive jurisdiction to inquire into and adjust such interstate rates as are alleged to be unfair or discriminative. The Court will find that in that opinion (at page 862) the Court discusses the contention that, as said statute was not retro-active in its terms, it was to be construed as prospective only, and as not having the effect of abrogating existing contracts in conflict therewith. In that connection the Court cites the case of *Southern Wire Co. v. St. Louis Bridge & Tunnel Railway Co.*, 38 *Mo. App.*, 191, where the Court said:

> We are clear of all doubt that it was the purpose of Congress, in enacting this statute, to put to an end all existing contracts and arrangements producing unjust discrimination among shippers upon interstate railways. . . . It would greatly impair its effect to hold that it does not operate to abrogate existing contracts which are opposed to its prohibitions. Such a holding would open the door to fraudulent evasions of it by the making of contracts creating unjust discriminations, and antedating them so as to place them seemingly beyond its reach.

Among others, the case of *Fitzgerald v. Grand Trunk Railroad Co.* (*Vt.*), 22 *Atl.*, 76, 77, is cited by the Supreme Court of Nebraska, in the case above referred to, wherein the court said, with reference to a contract which called for the transportation of lumber through three States:

> Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so on the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effects of subsequent legislation upon its subject matter by competent legislative authority. Citing numerous cases.

In that case the court concluded as follows:

> The case, then, comes to this: The plaintiff seeks to enforce a contract which is prohibited by law. The

doctrine is elementary that whenever the plaintiff is compelled, in order to make out his case, to shew the illegal contract, he cannot recover.

III.

PASSENGER FARE IS PAYABLE IN MONEY.

The object of the amendment of June 29, 1906, to the Act to regulate commerce was to place every passenger and every shipper over the lines of an interstate carrier on an exact equality,and require each one to pay in money the established published rates fixed in the tariffs of the carrier, filed with the Interstate Commerce Commission. To this end the words "or different" were inserted in Section 6 of said Act, so that clause, which is relied on by appellant in this case as a complete defense to this action, reads as follows:

> Nor shall any carrier charge or demand or collect or receive a greater or less *or different* compensation (that is other than in money) for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time.

Appellant cannot comply with this provision of said Section and at the same time comply with the contract which the Court is asked in this case to specifically enforce. In so far as said contract remains unexecuted or unfulfilled on the part of the appellant, the appellees are remediless. They would not have even a right of action

for damages, for the appellant has committed no breach, but Congress, in the exercise of its express power to regulate commerce, has stepped in and declared by necessary implication that such a contract as is sought to be specifically enforced herein is illegal and void, and this result is brought about by no act of the appellant, but by the lawful exercise of the power thus vested in Congress. In other words, the contract between appellees and appellant can no more be enforced than if it had been made subsequent to the enactment of said amendment.

If such a contract could not now be lawfully made with appellees by appellant, the contract made before the passage of said amendment cannot be enforced, although valid at the time it was made and supported by a sufficient consideration. The act to regulate commerce as amended contains *no exception* in favor of contracts such as this, but its provisions embrace all passengers and all shippers, no matter whether they have contracts, previously executed, for special rates or not.

Prior to the decree of the court below in this case a letter dated January 16, 1907, was written by Mr. J. F. Tucker, Chairman of the Central Territory Transportation Association, Chicago, to Mr. E. A. Moseley, Secretary of the Intrestate Commerce Commission, making the following inquiry, to-wit:

> Question has arisen as to the legality of issuing annual or other free or reduced rate transportation in favor of parties injured in wrecks prior to the passage of the Hepburn Law, contracts in settlement specifying the annual or other forms of free or reduced rate transportation shall be granted; also contracts or agreements as to free or reduced

rate transportation, made with parties for right of way before the passage of the Hepburn Law, whereby free or reduced rate transportation was to be furnished; also as to furnishing transportation for inspectors of employees' watches and solicitors for insurance.

Will you kindly advise me of the Commission's ruling in these matters, and thus oblige?

In response to this communication, Hon. James S. Harlan, one of the Commissioners, sent the following, dated at Washington, on January 19, 1907, to-wit:

The matter of free transportation has been considered by the Commission with great frequency and in many different forms. Replying, therefore, as briefly and concretely as possible to your letter of the 16th, I beg to say that the Commission, under the act to regulate commerce as amended June 29, 1906, has expressed the opinion that transportation cannot be used in payment for labor done, or services performed, or for supplies and materials purchased. We have also said that it cannot be issued in compensation for the conveyance of real estate for a right of way or for station purposse. We have also held that it cannot be issued in liquidation of damages claimed by one who has been injured through the negligence of a carrier. And these rulings apply whether the real estate was purchased or the claim for damages settled prior to August 28, 1906, when the act went into effect, or afterwards. On that date any such transportation then outstanding became void, and the undertaking of any carrier on the basis of any such contract thereafter to furnish free transportation was nullified by the act. In other words, the Commission holds, as I understand our attitude

on these questions, that transportation cannot be used as a medium for the discharge of debts and obligations of that character, whether the contract so to discharge such obligation in free transportation was dated before or after the date when the law went into effect. In answer to several inquiries we have advised the writers to consult with their counsel as to whether suit may be brought on such a contract in order to commute the value of the free transportation agreed upon into a money judgment against the carriers. (*Decisions of Interstate Commerce Commission relative to Railroad Passes and Free Transportation, Senate Document No. 226, 60th Congress, First Session, Communicated to the Senate February 6, 1908, page 18.*)

In the *Administrative Rulings and Opinions of the Interstate Commerce Commission*, revised by order of the Commission, February 3, 1908, page 72, it will be found the following rule, No. 67, was promulgated as early as September 15, 1906, to-wit:

PAYMENT FOR TRANSPORTATION (issued September 15, 1906).—Nothing but money can be lawfully received or accepted in payment for transportation subject to the Act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules.

These rulings on the part of the Commission appear to be well founded and necessary to carry into full force and effect both the letter and spirit of the Act to regulate commerce, as amended June 29, 1906. The decree appealed from is at variance therewith. To have settled and determined which interpretation of said Act is the true and correct one to be followed by appellant and other carriers subject thereto, has induced the taking of this appeal. If a prior contract with respect to passenger transportation, such as the one under consideration, is still valid and enforcible, a like contract for the transportation of property of any kind free or at reduced rates, made before August 28, 1906, would have to be also upheld by the courts.

In a recent opinion by this Court, delivered March 6, 1908 (*Armour Packing Co. v. United States*, 28 *Supreme Court Reporter*, 428), it is held that a shipper is guilty of accepting transportation of property at less than the carrier's published rates, in violation of the Elkins Act of February 19, 1903, where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier (executed August 6, 1905), which was the legal, published and filed rate when the contract was made, since the statute being then in force, is read into such contract, and becomes a part of it.

The same rule was laid down in *Chicago, Burlington & Quincy Railway Co. v. United States*, decided at the same time (Ib. 439).

In *Kentucky & Indiana Bridge Co. v. Louisville & Nashville Railroad Co.*, 34 *Am. & Eng. R. Cas.*, 630, Judge

Cooley, the learned Chairman of the Interstate Commerce Commission, delivered the opinion, and at page 653 said:

> But the act to regulate commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with State laws, as well as with Federal. There probably was never an act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render their literal enforcement impossible. The same may be said of the Federal revenue laws. Nothing is more likely than that a considerable change in customs regulations or customs duties, or in the provisions made for enforcement of excise laws will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.

It is true the order entered by the Commission in that case was not sustained by the Circuit Court of the United States for the District of Kentucky, but upon grounds, however, that did not conflict with the foregoing views of Judge Cooley. (*Kentucky & Indiana Bridge Co. v. Louisville & Nashville Railroad Co.*, 37 *Fed.*, 567.)

The non-enforcibility of the contract which is sought to be enforced in this case, results from the exercise by

Congress of lawful power, and the public policy embodied in the general Act to regulate commerce as amended June 29, 1906, which requires all passengers (except certain specified classes) on interstate railroads to pay in money for interstate transportation the regular rates and fares published and filed by the carrier with the Interstate Commerce Commission. It was the policy of Congress in enacting this general law to abrogate all prior contracts between interstate carriers by railroad and interstate passengers and shippers of freight, whereby the carrier had agreed to accept or receive for such transportation "a greater or less or different compensation" for the service rendered "between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time." Appellees had no vested right, under this contract with appellant, that was beyond the power of Congress to take away in the enactment of a general law regulating commerce among the States. Their contract with appellant is no more enforcible since the enactment of such general law, that it would be if there had been on October 2, 1871, incorporated therein an express provision that it was made and entered into subject to the power of Congress, in regulating commerce among the States, to nullify so much thereof as contemplated the issuance by appellant to appellees free passes for interstate passenger transportation.

The court below was erroneously of the opinion that because such contracts as this were not expressly referred to in the Act to regulate commerce and the Amendatory Act of June 29, 1906, and thereby abrogated, the latter Act "should be construed precisely as if, in its general

language, there was an express exception excluding from its operation the complainants' contract." On the contrary, it is insisted for appellant that this contract between appellant and appellees, as well as all others of a similar nature between interstate carriers by railroad and interstate passengers or shippers made prior to the enactment of the Amendatory Act of June 29, 1906, must yield to the prohibitive provisions of that general Act, for the very reason, if there were no other, that when Congress came to specify in Section 1 thereof the excepted classes to whom free passes for interstate passenger transportation might be lawfully issued, such private contracts for such transportation were not embraced within those exceptions. The expression of the exceptions enumerated in that section was equivalent to the exclusion of all others, without resorting to the provision in Section 6 of said Act prohibiting the receipt by the carrier of "a greater or less or different compensation" for the same service "than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

It is respectfully submitted that, upon the errors assigned and authorities cited, the decree of the court below should be reversed, with direction to dismiss appellees' bill.

HENRY LANE STONE,
Solicitor for Appellant.

AUTHORITIES CITED.

STATEMENT.

Secs. 1 and 2, Amendatory Act to Regulate Commerce, approved June 29, 1906.

Mottley et ux. v. Louisville & Nashville R. Co., 150 Fed., 406-13.

I.—JURISDICTION.

Sub-divisions 4 and 5, Sec. 5, Judiciary Act, March 3, 1891, 4 Fed. Stats. Anno., 298.

American Sugar Refining Co. v. New Orleans, 181 U. S., 277.

Huguley Manfg. Co. v. Galeton Cotton Mills, 184 U. S., 295.

Patton v. Brady, executrix, 184 U. S., 608.

II.—FREE PASSES.

Knox v. Lee, and Parker v. Davis (Legal Tender Cases), 12 Wall., 550-51.

Bullard v. Northern Pac. R. Co., 45 Am. & Eng. R. Cases, 234, 242-3, 245, 11 L. R. A., 246.

8 Cyc., at page 997.

Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee, 109 Ky., 408, 418-19.

Fitzgerald v. Fitzgerald & Mallory Construction Co., 59 N. W., 862-3.

Southern Wire Co. v. St. Louis Bridge & Tunnel R'y Co., 38 Mo. App., 191.

Fitzgerald v. Grand Trunk R. Co. (Vt.), 22 Atl., 76-77.

III.—PASSENGER FARE IS PAYABLE IN MONEY.

Decisions of Interstate Commerce Commission Relative to Railroad Passes and Free Transportation, Senate Document No. 226, 60th Congress, First Session, Communicated to Senate February 6, 1908, page 18.

Administrative Rulings and Opinions of Interstate Commerce Commission, Revised by order of the Commission, February 3, 1908, page 72, Rule No. 67, promulgated September 15, 1906.

Armour Packing Co. v. United States, 28 Supreme Court Reporter, 428.

Chicago, Burlington & Quincy R'y Co. v. United States, Ib., 439.

Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co., 34 Am. & Eng. R. Cases, 630, 653.

Same v. Same, 37 Fed., 567.

SYNOPSIS

	Page.
Statement	3
The issues	6
a. Sec. 1 of Act of June, 1906, does not cover this case	7
b. Sec. 6 of Act of June, 1906, does not cover this case	8
Construction of the Statute—	
The Act of June, 1906, does not embrace, and was not intended by Congress to embrace cases like this	11
Even tho' the Act of June, 1906, is broad enough, and was, by Congress, intended to embrace this case, it is violation of the Constitution of the United States, and especially the Fifth Amendment, and is therefore not enforcible as against Appellees	13
Brief of Solicitor for Appellant and Interstate Commerce Commission	17
Conclusion	20

AUTHORITIES CITED.

Constructions of Statutes.

United States *v.* Kirby, 74 U. S., 7 Wall..... 486–7
Carlisle *v.* United States, 16 Wall..... 153
Chew Heowing *v.* United States, 112 U. S..... 555
Holy Trinity Church *v.* United States, 143 U. S..... 457
Bate Refrigerator Co. *v.* Sulzberger, 157 U. S..... 37
Market Co. *v.* Hoffman, 101 U. S..... 116
Auffmardt *v.* Rasin, 102 U. S..... 620
Cook *v.* United States, 138 U. S..... 181

Constitutionality of Act of 1906, as applied to this case.

Wilkinson *v.* Leland, 2 Pet..... 657
Osborne *v.* Nicholson, 13 Wall..... 654
Dubuque R. R. Co. &c. *v.* Richmond, 19 Wall..... 584
This case is not overruled by, but is distinguished from Addyston Pipe & Steel Co. *v.* United States, 175 U. S... 136

No. 252.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

v.

ERASMUS L. MOTTLEY AND ANNIE E. MOTTLEY, HIS WIFE, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLEES.

STATEMENT.

The facts of this case are exclusively contained in Appellee's bill of complaint, and are few and simple.

In 1871, the Appellees, E. L. Mottley and his wife, were en route from their home in Bowling Green to Louisville, Ky., as passengers upon Appellant's train. By reason of the negligence of Appellant's agents and

servants, both Mottley and wife were seriously injured.

The Railroad Company confessed its liability for the injuries inflicted. Instead of paying $5,000 or $10,000 in money, or any other agreed sum, for reasons satisfactory to itself, it preferred to pay the damage and discharge its confessed obligation to Appellees by performing service for them.

The result was, that the parties closed the whole matter by the contract which forms the basis of this suit, and which is as follows:

"LOUISVILLE, KY., Oct. 2, 1871.

"The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them.

"THOS. J. MARTIN,

"*Vice President Louisville & Nashville Railroad Company.*

(SEAL.)

"WILLIS RANEY, *Secretary.*"

The Appellant, up to January, 1907, fully complied with its contract, and, I feel sure, is still willing to comply with it, provided, in so doing, it does not violate the laws of the land and subject itself to onerous fines and severe penalties.

It seems clear that this contract is an *executed*, and not an *executory* contract, and should be so treated. It is as fully executed as though the Mottleys had paid the company $10,000 in cash in consideration that it would perform the service of transporting them till 1910, or any other time; as fully executed as though a man should buy and pay for an hundred horses and all were delivered save one, or a dozen; as fully executed as though Mottley had bought and paid for a ticket over Appellant's road and had not used it. No importance can fairly be attached to the use of the words "free pass" in the contract.

To call that a "free pass" which was bought and paid for, does not make it other than it is. The obligation of Appellant to issue the *evidences* of Appellee's right to transportation annually, is of the same effect as though Appellant had, in October, 1871, executed and delivered to them tickets good for the remainder of their lives. The pass, or ticket, is simply an *evidence* of a right, and not the *right itself*.

THE ISSUES.

To Appellee's bill of complaint, seeking, not free passes, or free transportation, but seeking to have per-

formed for them the service for which they had theretofore paid in full, the Appellant demurred, and the demurrer having been overruled, it declined to plead further, and all the averments of the bill were thereby confessed.

There is no issue of fact between the parties to this litigation.

Appellant's refusal to perform for the Appellee's that service for which it has received full and satisfactory compensation is bottomed alone upon the idea that it is forbidden so to do because of the passage by Congress of the Act of June 29, 1906, entitled, "An Act to amend an Act, entitled an Act to regulate commerce, approved Feburay 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

A twofold issue is thus presented:

First—I insist that this Act of Congress, when fairly construed, was never intended to cover a case such as is here presented.

Second—I insist that even if the Act is broad enough to cover this case, and was by Congress intended to reach and apply to cases of this kind, that the Act is repugnant to the Constitution of the United States, and is not enforceable as against Appellees.

FIRST ISSUE.

DOES THE ACT OF JUNE 29, 1906, COVER THIS CASE, AND WAS IT SO INTENDED BY CONGRESS.

The Act of June 29, 1906, was an amendment to the Act of 1887, in which new provisions were incorporated. Only two provisions of this Act, it is believed, have any bearing upon the issue presented by this case, and they are as follows:

> Section 1. . . . "No common carrier subject to the provisions of this Act shall, after January 1st, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees." . . . Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred, nor more than two thousand dollars, and any person other than the persons excepted in this privision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty." . . .

Manifestly, the sole purpose of this provision was to forbid, under penalty, all carriers from *giving* free passes, and to forbid, under like penalty, every person, not in the excepted class, from *using* such free passes. It seems that the only argument needed to show that this provision does not touch the facts of this case, and was not so intended, is to read the Bill of Complaint and read the law. Suppose Appellant had issued passes to Col. Mottley and wife for 1907, as required by its

contract of 1871, and suppose it had been indicted for so doing, and Mottley and wife had been indicted for using such passes. *Could* either be convicted?. *Should* either be convicted? Is not the conviction of either legally an unthinkable proposition?

SECOND ISSUE.

DOES SECTION 6 OF ACT OF 1906 COVER THIS CASE?

But it is insisted that if Section 1 of the Act of June, 1906, does not cover a case like the one at bar, Section 6 does. That part germain says:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers, or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the Act; nor shall any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. . . The willful failure upon the part of any carrier subject to said Act to file and publish the tariffs or rates and charges as required by said

> Act, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof, the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

This provision, under heavy penalties, requires at the hands of the carrier two things: First, that it shall file and publish its tariff rates, and, second, that it shall abide by such rates until legally changed. Congress, in the passage of this act, was looking to the *future*, and not to the *past*. It saw that gross evils existed in the land, saw unjust discriminations upon the part of some carriers, saw rebates given and received, saw inequalities hurtful to the country, saw favoritism injurious to the masses of the people. It desired to correct these evils and end these abuses, hence the act requiring tariff rates and requiring the charges by the carrier to be according to those rates. But did a condition such as is shown by this record, enter into the legislative mind? Was it the legislative intent to fine a carrier from $1,000 to $20,000 for issuing a ticket that had been paid for?

Counsel for Appellant says that the language of the act is broad, and contains no exception, and if Congress had intended to have *excepted* a case like this, it would have said so. My reply is, that if Congress had intended the act to *embrace* a case like this, it would have said so, and *should* have said so, and the fact that it did not say so, is evidence conclusive that it had no such purpose.

In construing this statute, insofar as it bears upon this case, the Court is called upon to decide this clear-cut, concrete proposition: Did Congress, under power conferred upon it by the Constitution, to regulate commerce between the States, by this act to "regulate commerce," intend to annul a contract, the full consideration for which has passed? Did Congress, under the guise of an act to *regulate commerce*, intend to confiscate Appellee's property? Did Congress intend to relieve a carrier from its obligation to perform services for which, prior to the passage of the act in question it had received full and satisfactory compensation? Applying the question of intention to the facts of this case, did Congress intend that, if Col. Mottley and his wife used passes issued them under the contract of 1871, that they should each be fined from $1,000 to $20,000, and that, too, when the contract of 1871 was, when made, perfectly legal?

Counsel for Appellant, a profound lawyer, and eminent for his fairness in discussion, says (pages 14-15):

> "Insofar as said contract remains unexecuted or unfulfilled on the part of the Appellant, the Appellees are remediless. They would not have even a right of action for damages, for Appellant has committed no breach. . . ."

Assuming this statement to be indisputable, did Congress intend, not only to nullify a contract, valid when made—to turn over to the Appellant the money which the Appellee had paid, but also to deprive Appellees of

all possibility of redress? And yet, if Appellant's contention is correct, this result inevitably follows.

The learned Judge of the lower court well said:

> "Such invalidation could be justified upon no principle which would aid in the general purposes of the legislation, but would be a wanton infliction of an unnecessary wrong."

So I respectfully insist that Congress never intended the Act in question to be retroactive, never intended it to apply where the rights of persons, other than the carriers, were involved—never intended to inflict a wrong upon the humblest of the people.

CONSTRUCTION OF STATUTES.

To hold that the Act of 1906 was never intended to reach a case like the one at bar, is not only consonant with sound principle, with common sense, and with justice, but it is believed to be fully justified by the utterances of the courts of the land.

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will also, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter."

United States v. *Kirby*, 74 U. S. (7 Wall.), 486-7.

> "All general terms in the statutes should be

limited in their application, so as not to lead to injustice, oppression or unconstitutional operation, if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character."

Carlisle v. *United States*, 16 Wall., 153.
Chew Heyng v. *United States*, 112 U. S., 555.
Holy Trinity Church v. *United States*, 143 U. S., 457.
Bate Refrigerator Co. v. *Sulzberger*, 157 U. S., 37.

In *Market Co.* v. *Hoffman*, 101 U. S., 116, this Court says:

"In *Brewer's Lessee* v. *Bloucher* (14 Pet., 78) it was said to be the undoubted duty of the court to ascertain the meaning of the legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the legislature never designed to include in it."

On the subject of retroactive statutes, in *Auffmord, Jr.*, v. *Rasin*, 102 U. S. (12 Otto, 620-3), it is said: "If it be conceded that Congress could do this, the principle is too well established to need citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction."

To the same effect is *Cook* v. *United States*, 138 U. S., 181.

IS THE ACT OF JUNE 29, 1906, CONSTITUTIONAL WHEN APPLIED TO A CASE LIKE THE ONE AT BAR.

But suppose that no doubt could exist about the fact that the Act of 1906 embraced, and was indisputably intended to embrace this specific case, and all others like it—if indeed there should be any other like it in all the Union. Suppose the Act had contained another section saying that, "Wherever a carrier has heretofore received compensation for transporting a passenger for a determinable period, and the agreed time during which such carrier is obligated to so transport such passenger has not expired, said carrier is forbidden, under penalty of not less than $1,000 nor more than $20,000, from fulfilling its said contract. And if such passenger accepts from such carrier a ticket in pursuance to said contract, and uses same, he shall be liable to a like penalty. *Provided*, however, that nothing in this section shall be construed as to hold such carrier liable for damages for its failure, after the approval of this Act, to further attempt to fulfill said contract."

If such a section had been added to the Act, there could be no doubt but that it would cover this case, and there could be no doubt as to the intention of Congress.

But *could* this Court, would this *Court* enforce such a law?

That Congress has vast power is conceded. It is a *potent* arm of the Government, but it is not *omnipotent*. The humblest man in the Republic may stand behind the Constitution and say to Congress, as was said of

old by the prophet: "Hitherto shalt thou come, but no further; and here shall thy proud waves be stayed."

When a private citizen has made a lawful contract, has executed that contract fully so far as his obligation is concerned, and has parted with his money or property on the faith of the inviolability of his contract, it is no answer to his protest against the annulment of his contract and the confiscation of his property, to say that Congress has power to regulate commerce between the States, and that every corporation takes and holds its existence, knowing that Congress has power over both its existence and its methods.

What becomes of the provision of the Constitution saying, that no man shall be deprived of his property "except by due process of law," if Congress has the power by its *ipsi dixit* to legislate $1,000 or $10,000 or $1 out of the hands of Col. Mottley into the hands of the Appellant? And yet that is the effect of the Act of 1906 as applied to this case.

What becomes of the doctrine of "vested rights," the sheet anchor of private rights for more than one hundred years, if Congress has the power to specifically annul a solemn contract lawful when made?

And yet that is the effect of the Act of 1906 as applied to this case. It is true that the Constitution of the United States contains no inhibition upon Congress against the passage of laws impairing the obligation of contract; but it is none the less true that with this Court private contracts and private property have always been sacred things, almost as sacred as human liberty itself.

In *Wilkerson* v. *Leland*, 2 Pet., 657, Judge Story, speaking for this Court, said:

> "The fundamental maxims of a free Government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming the power to violate them —a power so repugnant to the common principle of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights, vital to their security and well-being without very strong and direct expression of such intent."

He added:

> "We know of no case in which a legislative act to transfer the proper of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

In *Osborne* v. *Nicholson*, 13 Wal., 654, this Court says, in discussing the effect of the repeal of a statute:

> "Rights acquired by deed, will, or contract of marriage, or other contract, executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to

> the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a floodtide of intolerable evils. It would be contrary to the general principles of law and reason, and to one of the most vital ends of government. The doctrine of the repeal of statutes, and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to explicit declaration. Every doubt should be resolved against a construction so fraught with mischief. . . . The proposition, if carried out in this case, would in effect take away one man's property and give it to another, and the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation."

In *Railroad Co.* v. *Richmond*, 19 Wall., 584, this Court says:

> "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminatory State legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create imperiments to such intercourse."

So I insist that, both upon principle and authority, even though the Act of 1906 was intended to cover a case like this, it is not enforceable, because repugnant to, and violative of, both the letter and spirit of the Federal Constitution.

BRIEF OF SOLICITOR FOR INTERSTATE COMMERCE COMSION AND FOR APPELLANT.

It would unduly lengthen this brief to review the excellent arguments made, and numerous authorities cited, by the solicitor for the Interstate Commerce Commission and the solicitor for the Appellant. To the suggestion made that the case at bar falls within the first section of the Act of June 29, 1906, I can only repeat that, in furnishing the Appellees with transportation under the contract of 1871, the Appellant in no proper sense can be held to furnish the Appellees with free passes. The passes furnished are not free, but bought and paid for, and it seems to me that this *fact* closes all *argument*.

It is contended by counsel that the Act of 1906 should be literally construed, and that, upon its face, there are no exceptions available for Appellees. But if Section 1 is literally construed, it does not cover this case as argued, because the passes are not free passes, nor does Section 6 apply, because it requires carriers to file and publish certain rates, for *future* use, as I insist, and further provides that no carrier shall charge, or demand, or collect, or receive a greater, or less, or different compensation for such transportation than are specified in the tariff filed. Now, in performing for Appellees a service for which Appellant was paid, before the Act of 1906 became effective, the Appellant makes and can make no charge whatsoever under the tariff it is required to file.

Recognizing the doctrine of "vested rights," as laid down by this Court, and the interpretation given to the

Fifth Amendment to the Federal Constitution, counsel for Appellant says that, "While Congress may not pass an Act for the purpose of impairing the obligations of contracts, it may, in the due exercise of the powers expressly conferred upon it, incidentally do so."

In support of this contention, the Legal Tender cases and others along this line are cited. I fully recognize the doctrine laid down in these cases, but I most respectfully insist that this doctrine does not apply, and cannot apply to such a case as we have here.

As stated, the Act of 1906, so far as this controversy is concerned, does two things: It forbids a carrier to give free passes except in certain cases, it requires the carrier to file tariffs and to regulate its charges according to these tariffs. All this looks to the future. Applied to the future, it corrects many evils, destroys many abuses, and is within the letter and spirit of the organic law. But counsel insist that the Act is more far-reaching than this, that it relates to the past as well as to the future—that it operates to annul all pre-existing contracts such as Appellees hold. This effect manifestly does not flow as an *incident* to the Act, but must result as a positive and substantive declaration. For, as stated above, if the Act of 1906 covers, and was intended by Congress to cover, this case, so far as it is concerned, the Act must be construed as though it related alone to this kind of a case. So, I insist that the Act must be construed as though its only provision was to annul pre-existing contracts. And, if it so read, this contract would be annulled not as an incident, but as a direct expression of the legislative will.

A number of cases have arisen, such as *Fitzgerald* v. *Fitzgerald, etc.*, 59 N. W., Nebraska Supreme Court, which say that this Act to regulate commerce puts an end to existing arrangements and contracts, but it is believed that no court has ever yet gone so far as to hold that such a contract as exists in this case, which, as argued, is an *executed* and not an *executory* contract, which is a *contract*, where the consideration was paid in good faith, and is not a simple *traffic arrangement*, was not valid and binding. That "there can, in the nature of things, be no vested right in an existing law which precludes its change or repeal" is true only in a modified sense. All laws may be subject to amendment or repeal, but no law can destroy the rights of a citizen, which rights were lawfully acquired under a constitutional law.

It seems that counsel lose sight of the fact that this is not a contest between the Government and the Louisville & Nashville Railroad Company, in which the company questions the power of Congress to pass a law for the regulation of its conduct as to passengers and freight, but it is a contest between the Mottleys and the company, wherein they seek to enforce a contract valid when made, and which, as stated, so far as they are concerned, was fully executed before the Act of 1906 was passed. They are seeking simply a delivery to them of that which they have bought and paid for. If they are adjudged their property, they only get what they paid for; if they are denied what they paid for, the Appellant is given their property by a simple legislative declaration. If this be "due process of law,"

as expounded by the "Fathers," I confess my amazement.

Counsel for the Commerce Commission maintains that the power of Congress to regulate interstate commerce is paramount; that Congress has power over corporations engaged in interstate traffic greater than over a private individual; that the Dartmouth College case turned upon the point that it was a "private and not a public corporation," and that "the distinction is constantly to be kept in mind between cases involving strictly private rights, and those relating to matters affected by a public interest." (Brief, p. 14.)

Against these propositions I make no protest.

My answer is, that the only "rights" involved in this controversy are "private rights." I do not deny the power of Congress to pass the Act of June, 1906. I do not deny the power of Congress to regulate interstate commerce. But I do deny the power of any legislative body whatsoever, to deprive any man of his property, and to justify the spoliation upon the assumption that the Act which thus injures him is directed, not against him, but against another.

CONCLUSION.

So far as the Appellees are concerned, the amount involved in this case is not essential to their comfort or happiness. They are both walking amid the lengthening shadows of the eventide, and, in the course of nature, it cannot be long before they will enter upon their final journey over a road, not regulated by either

Act of Congress or decree of the Interstate Commerce Commission. The Appellant has, with the utmost courtesy and good faith, hitherto carried out its part of the contract of 1871, and, as I believe, would continue to do so if not inhibited by a law not of its seeking.

The number of cases standing on "all fours" with this case are, it is believed, very few, if indeed there be any at all.

So the interest which attaches to the decision of this case, so far as the parties are concerned, and so far as the Interstate Commerce Commission is concerned, springs from the principle involved rather than the amount. It is another of many cases which have arisen wherein this Court is called upon to *mark again* the limits of Congressional power, and to *define again* those rights of the individual which are sacred under the law, and which neither the executive, legislative nor judicial arm of the Government can arbitrarily infringe or destroy.

An affirmance of the judgment of the Circuit Court is most respectfully asked.

LEWIS MCQUOWN,
Solicitor for Appellees.

SYNOPSIS.

Page.

1. The contract in question was contrary to public policy when made. 3
2. The contract unlawful since the commerce act of June 29, 1906, went into operation 6
   (*a*) The act forbids the charging or receiving a "greater or less or different compensation than that specified in the tariffs on file" 6
   (*b*) Acceptance by a carrier in payment for transportation of a release of a claim for damages, a violation of this provision of the act 6
3. The regulation forbidding departures from the published rates on file, a legitimate exercise of power by Congress 8
   (*a*) "The right to make such regulation is inherent in the power of Congress to legislate respecting interstate commerce". 9
4. No vested right can be acquired by contract which will deprive Congress of the power to regulate commerce 10
   (*a*) Contracts relating to interstate transportation subject to the power of Congress to prescribe regulations governing interstate commerce 11, 12
5. The Dartmouth College case and cases in line therewith, distinguished from cases like the case at bar, involving a matter not strictly private 13
   (*a*) Distinction between cases involving strictly private rights and those relating to matters "affected by a public interest" 14
6. Construction 15–20
   (*a*) Words, if unambiguous, must control 15–18
   (*b*) Law does not except special contracts from its operation ... 16
   (*c*) Engrafting an exception upon the general rule laid down in a statute, not suggested by, or implied from, the words used, is, not construction, but legislation 15, 16
   (*d*) The construction given the law by the court below not only *ultra*, but *contra*, its letter 19
   (*e*) The prevalence of contracts such as that in question justifies the presumption that such prevalence was one reason which influenced Congress to enact the regulation forbidding departures from the published rates on file 23
7. The case important because (*a*) of the principle involved and (*b*) of the prevalence of contracts throughout the country such as that in question 22, 23

38895—08——1

AUTHORITIES CITED.

	Page of argument where cited.
Union Pac. Ry. Co. *v.* Goodridge, 149 U. S., 690, 691	4, 5, 6
Armour Packing Co. *v.* U. S., Oct. Term, 1907, Sup. Ct. (Not yet reported)	5, 9, 16
Endlich on Int. of Statutes, secs. 4, 5, 6, 8, 27	5, 17, 18, 20
U. S. *v.* A., T. & S. F. Ry. (U. S. Dist. Ct., So. Dist. Cal. (Not yet reported)	6
I. C. C. *v.* C. & O. Ry. Co., 200 U. S., 361	6
Texas Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., bot. p. 439	7
Texas & Pac. Ry. Co. *v.* Mugg, 202 U. S., 242	7
Gulf., Col., &c., Ry. *v.* Hefley, 158 U. S., 98	7
Poor Grain Co. *v.* C., B. & Q. Ry. Co., 12 I. C. C. Rep., 492	7
Gibbons *v.* Ogden, 9 Wheat., 1	8
Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., 228	8
Scranton *v.* Wheeler, 179 U. S., 162	8
Legal Tender cases, 12 Wall., 551	11
Cooley Const., Lim., 7th Ed., 509, 510	11
Bradford *v.* Jenkins, et al., 41 Miss., 328, 335–337	11, 12, 21
Words & Phrases Judicially Defined, Vol. III, 22, 28	12
Dartmouth College *v.* Woodward, 4 Wheat., 494, 630, 634	13, 15
Smythe *v.* Ames, 169 U. S., 544	14
Munn *v.* Ill., 94 U. S., 127, 130	14
Chicago, &c., Ry. Co. *v.* Minnesota, 134 U. S., 461	14
Rhode Island *v.* Mass., 12 Pet., 892	15, 16, 18
U. S. *v.* Kirby, 7 Wall., 483	19
Bennet *v.* Woolfolk, 15 Ga. Rep., 213	21
I. C. C. *v.* Ry. Co., 167 U. S., 506	22

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

LOUISVILLE & NASHVILLE R. R. Co., appellant,
v.
ERASMUS L. MOTTLEY AND ANNIE E. Mottley, his wife.

No. ~~232~~ 37.

As this case involves the construction of important provisions of the act to regulate commerce and the Interstate Commerce Commission is charged by the law with the duty of enforcing those provisions, this argument is respectfully submitted by the Commission, as *amicus curiæ*, by express leave of the court.

ARGUMENT.

I.

THE CONTRACT WAS CONTRARY TO PUBLIC POLICY WHEN MADE.

The contract in question is as follows:

> The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released company from all damages or claims for dam-

> ages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph Station, Jefferson County, Ky., hereby agrees to issue free passes on said railroad and branches now existing, or to exist, to said E. L. and Annie E. Mottley for the remainder of the present year, and thereafter, to renew said passes annually during the lives of said Mottley and wife or either of them.

This contract does not limit the amount of transportation to be furnished the Mottleys. Under it, they may travel every day and night in the year during their lives or the life of either of them, on all the lines of the railroad, main or branch, existing at the date of the contract or thereafter "to exist."

No estimate appears to have been made of the amount of the damages which the Mottleys sustained by reason of their injuries and, hence, it can not be determined whether the thirty-five years' unlimited transportation they have received since the date of the contract (October 2, 1871) amounts to more or less at the regular transportation rates than those damages. It is clear that under such a contract the beneficiaries may, if their lives be sufficiently prolonged, receive transportation at less than the rates charged the public in general. (As to payment for transportation by release of an unliquidated claim for damages, see *Union Pac. Ry. Co.* v. *Goodridge*, 149 U. S., pp. 690, 691.)

While at the date of the contract there was no statutory prohibition of "greater or less or different"

rates than those specified in the tariffs on file, yet a contract of this character was not in accordance with sound public policy as indicated by the subsequent legislation of Congress. The railway company, deriving its franchise or "right to exist" from the public and operating a public highway, was morally, if not legally, bound to treat all its patrons alike, giving exclusive privileges to none. (*Union Pac. Ry. Co.* v. *Goodridge*, bot. p. 690, *supra*.)

It is claimed that the abrogation of the contract will operate great hardship to the Mottleys, but whether this is so or not depends upon the amount of damages to which they were entitled and the value of the transportation at the regular tariff rates which they have received. However this may be, "considerations of hardship address themselves to the lawmaking branch of the Government," and not to the courts.

Armour Packing Co. v. *U. S.*, October term, 1907, not yet reported; Endlich on Interpretation of Statutes, secs. 4, 5, and 6.

* (209 U.S. 56, 82)

II.

THE CONTRACT UNLAWFUL SINCE THE COMMERCE ACT OF JUNE 29, 1906, WENT INTO OPERATION.

The act to regulate commerce as amended June 29, 1906, forbids the receiving or charging by a common carrier subject to its provisions of "a greater or less or different compensation for the transportation of passengers or property than that specified in the tariff filed and in effect at the time."

It is conceded that the contract in question could not have been lawfully entered into since the amended act became effective. The court below says in its opinion, "It is obvious that contracts of a similar character could not be made after the act became effective."

It is well settled that the issuance of interstate transportation and the performance of interstate transportation service, in consideration of a release by a passenger or shipper of a claim for damages against the carrier, is a departure from the published rates on file and as such forbidden by the law.

Union Pcc. Ry. Co. v. *Goodridge*, 149 U. S., 690, 691.

U. S. v. *A., T. & S. F. Ry.* (U. S. Dist. Court, So. Dist. of Cal., not yet reported.)

I. C. C. v. *Ches. & Ohio Ry. Co.*, 200 U. S., 361.

That the published rates on file are made by the law standards from which there can be no departure, in any sense or to any extent, without subjecting the carrier or its patrons, or both, to penalties prescribed by the law, is laid down clearly and with great force in the following, among other, cases:

Texas Pac. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S., bot. p. 439.

Texas & Pac. Ry. Co. v. *Mugg*, 202 U. S., 242.

Gulf, Colo., &c., Ry. v. *Hefley*, 158 U. S., 98.

Poor Grain Co. v. *C., B. & Q. Ry. Co.*, 12 I. C. C. R., 492.

III.

THE REGULATION IN THE COMMERCE ACTS FORBIDDING DEPARTURES FROM THE PUBLISHED RATES ON FILE, A LEGITIMATE EXERCISE OF POWER BY CONGRESS.

All the cases concur in holding that the power of Congress to regulate commerce is paramount and is unrestricted except by the limitations upon its authority by the Constitution. It is said by this court that that power is "complete in itself and acknowledges no limitations other than those prescribed by the Constitution."

Gibbons v. *Ogden*, 9 Wheat., 1.

Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S., 228.

Scranton v. *Wheeler*, 179 U. S., 162.

The only limitation prescribed by the Constitution is that the laws enacted by Congress for carrying into execution the powers granted by the Constitution shall be "necessary and proper." (Subdiv. 18, Sec. VIII, Art. I, Constitution.) Whether legislation is necessary and proper is a question wholly and exclusively within the province of the legislative body.

This court, in speaking of the provision (involved in this case) of the commerce acts as amended June 29, 1906, forbidding any departure from the rate

specified in the tariffs, and requiring the carrier not to charge or receive "a greater or less or different" compensation than that so specified, says, "The right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce."

Armour Packing Co. v. *U. S., supra.*

38895—08——2

IV.

NO VESTED RIGHT CAN BE ACQUIRED BY CONTRACT WHICH WILL DEPRIVE CONGRESS OF THE POWER TO REGULATE COMMERCE—CONTRACTS RELATING TO INTERSTATE TRANSPORTATION, SUBJECT TO THE POWER OF CONGRESS TO PRESCRIBE REGULATIONS GOVERNING INTERSTATE COMMERCE.

While the power of Congress to enact the regulation of commerce involved in this case is not denied, and it is conceded that no contract of the character of that in question could since its enactment be lawfully made, it is still contended that the giving to that regulation the effect of abrogating the contract from the date of its enactment will be illegal and inequitable in that it will impair the obligation of the contract by divesting a vested right acquired thereunder long prior to such enactment.

The interstate transportation of passengers is commerce within the meaning of the commerce clause of the Constitution. The subject-matter, therefore, of the contract between the Mottleys and the railroad company was interstate commerce. The right of parties to make contracts with interstate carriers in respect to interstate commerce is subject to the power of Congress to prescribe regulations governing such commerce. The parties to such contracts are chargeable with notice of this power, and it enters into and forms a part of such contracts.

In the Legal Tender cases this court says:

> As in a state of civil society property of a citizen or subject is ownership subject to the lawful demands of the sovereign, so *contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate governmental authority.* (12 Wall., 551.)

Judge Cooley in discussing the question, "What is a vested right in the constitutional sense?" says:

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws, but as changes of circumstances and of public opinion as well as other reasons affecting the public policy are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that *many rights, privileges, and exemptions, which usually pertain to ownership under a particular state of the law, and many reasonable expectations, can not be regarded as vested rights in any legal sense.* (Cooley Con. Lim., 7th ed., pp. 509, 510, and cases there cited.)

In *Bradford* v. *Jenkins et al.* (41 Miss., 328, 335–337) it is held that—

> A contract to do a thing lawful when made is avoided by subsequent legislation making

it unlawful. "Every owner of property holds the same subject to such action as the sovereign power of the state may in the exercise of its legitimate sovereignty adopt in relation to it."

Parties can not by contracting with a common carrier of interstate commerce acquire vested rights which will tie the hands of Congress and deprive it of the power under the commerce clause of the Constitution to enact laws regulating commerce. The words "due process of law," in the fifth amendment to the Constitution, embrace not only the established mode of procedure in the courts but also constitutional legislative action by Congress or other legislative body. In Cooley's Constitutional Limitations the former is spoken of as "due process of law" and the latter as "the law of the land." (Cooley Con. Lim., 7th ed., 502.) It is held by the courts that these two phrases, though verbally different, express the same thought and are synonomous. (Words & Phrases Judicially Defined, Vol. III, 2228, and numerous cases there cited.)

V.

THE DARTMOUTH COLLEGE CASE AND CASES IN LINE THEREWITH DISTINGUISHED FROM CASES LIKE THE PRESENT INVOLVING A MATTER NOT STRICTLY PRIVATE.

The case known as the Dartmouth College case is the leading or pioneer case on the subject of the impairment of the obligation of contracts by state legislation. The decision in that case, that the act of the legislature of the state of New Hampshire altering the charter of the college, impaired the obligation of the contract and was unconstitutional and void, was based distinctly on the ground that, under the charter Dartmouth College was "a private and not a public corporation" (4 Wheaton, at page 634 et seq.), and the court held that, if it had been a public corporation, the "subject" would have been "one in which the legislature might have acted according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States." (Ib., 630.)

Common carriers by rail operate public highways. They are quasi-public corporations, and their business is held by this court to be "affected with a public interest." "When a railroad company is char-

tered, it is said to be for the purpose of performing a duty which belongs to the State itself."

Smythe v. *Ames*, 169 U. S., 544.
Munn v. *Illinois*, 94 U. S., 127, 130.
Chic., etc., Ry. Co. v. *Minnesota*, 134 U. S., 461.

Under the decision in the Dartmouth College case, therefore, the legislation by Congress involved in the present case, if applied to the Mottley contract, can not be said to impair the obligation of that contract within the meaning of the Constitution—even if the constitutional inhibition were addressed to Congress as well as to State legislatures.

The distinction is constantly to be kept in mind between cases involving strictly private rights and those relating to matters "affected by a public interest."

VI.

CONSTRUCTION—WORDS, IF UNAMBIGUOUS, MUST CONTROL—LAW DOES NOT EXCEPT SPECIAL CONTRACTS FROM ITS OPERATION—THE CONSTRUCTION GIVEN THE LAW BY THE COURT BELOW NOT ONLY ULTRA, BUT CONTRA, ITS LETTER.

The court below, in order to sustain its conclusion, holds that "we should construe the act as containing an *exception* to the general language used, and that the issuing of the free passes provided for in the contract was not meant to be prohibited by the statute." This court has laid it down as a general rule that "where no exception is made in terms none will be made by mere implication or construction." (*Rhode Island* v. *Mass.*, 12 Pet., at page 892, and cases there cited.)

In *Dartmouth College* v. *Woodward*, 4 Wheat., at page 494, the rule as to exceptions by construction is laid down as follows:

> The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

A construction engrafting an exception upon the general words of a statute is not allowable except in a case

of implication *based upon those words.* The courts can not for this purpose go entirely outside the words used. (*Rhode Island* v. *Mass., supra.*) Making an exception not suggested by, or implied from, the words used, is, not construction, but legislation.

In *Armour Packing Co.* v. *U. S., supra,* this court held that the law could not be construed as "*excepting special contracts from its operation.*" The special contract in that case was for a rate of 23 cents per hundred pounds, which was then the regularly filed and published tariff rate. While the contract was in force, the tariff was amended and duly published and filed, advancing the rate to 35 cents per hundred pounds. The shipper (Armour Packing Co.) insisted upon the contract rate, but the carrier contended that the contract could not apply after the rate had been advanced, and this court sustained this contention, saying—

> *There is no provision excepting special contracts from the operation of the law.* One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute.

The object of all construction is the ascertainment of the intention of the lawmaking body and when the words of a statute are unambiguous, as in the present case, the intention is to be gathered from those words. "They are the only interpreters of the mind of the

legislature. To give a statute a construction different from that which its words import is not to interpret law, but to make it. Every departure from the clear language of the statute is in effect an assumption of legislative powers by the court." (Sec. 8, Endlich on Stat.)

The court below seeks to justify what is practically an amendment of the law on the ground that it is necessary in order to prevent "gross injustice" or irreparable injury to the Mottleys. Where the language of a statute is plain and unambiguous "it matters not what the consequences of a literal construction might be. Judges are not to mold the language of statutes in order to meet an alleged inconvenience or an alleged equity; are not to be influenced by any notions of hardship or of what in their view is right and reasonable; are not to alter clear words, though the legislature may not have contemplated the consequences of using them. They can not be construed contrary to their meaning, *as embracing or excluding cases*, merely because no good reason appears why they should be excluded or embraced." (Endlich on Stat., sec 4, and cases there cited.)

The court below, as a further ground of justification of its action, says:

> Of course, contracts like the one sought to be enforced are extremely rare—so rare that presumably they did not in fact come within the contemplation of Congress when it was perfecting sections 1 and 2 of the act of 1906.

Courts are bound "to give effect to the plain language of the law, although they suspect (on conjectural grounds only) that the language does not faithfully express *what would have been the intention of the legislature if the specific case had been proposed to it.*" (Endlich, sec. 6.) There may have been "an oversight in the framers of the act, but it must be construed according to the plain and obvious meaning of the words used. I can not doubt, says Lord Campbell, what the intention of the legislature was; but that intention has not been carried into effect by the language used. It is far better that we should abide by the words of a statute, than seek to reframe it according to the supposed intention." (Ib.)

The court below, instead of indulging the presumption that the existence of contracts like the contract in this case "did not in fact come within the contemplation of Congress," should have presumed the contrary. The solicitor of the railway company in his motion to advance this case for hearing in this court alleges as one ground that "common carriers subject to the provisions of the commerce act have made a LARGE NUMBER OF SIMILAR CONTRACTS as to interstate transportation of both freight and passengers." Congress must be presumed to have known this fact. Moreover, Congress had before it and considered the matter of exceptions to the general rule of the law forbidding "free passes" and made a number of exceptions, none of which cover a special contract of any kind. In *Rhode Island* v. *Mass.*, *supra*, this court says, "An exception of any particular case pre-

supposes that those which are not excepted are embraced within the grant or prohibition." *Expressio unius, exclusio alterius.*

The court below in its opinion admits that "*In terms there is no clause in the act which would except agreements like the complainants' from the control of its provisions.*" This is a confession by the court that its construction is outside and independent of the language of the law and, therefore, in violation of the fundamental rule, that the intention of the legislature must be gathered from the words it has used, when those words are plain and unambiguous. The construction given the law by the court is not only *ultra*, but *contra*, the letter of the law.

The court below cites a number of cases holding in substance that courts may go outside the letter of the law where the letter is ambiguous or where a literal construction will lead to an absurdity. The facts in these cases are not given. On examination it will be found that they differ radically from the case at bar. For example, the case of *U. S.* v. *Kirby* (7 Wall., 483), cited by the court, involved the construction of the act of Congress of March 3, 1825, which subjected to a fine any person who "*shall knowingly and willfully* obstruct and retard the passage of the mails." This court held that the acts which create the obstruction must be performed "with the intention that such shall be their operation"—in other words, that there must be a criminal intent. This was merely a construction of the meaning of the ambiguous words, "knowingly and willfully," and not

the engrafting upon the act of an exception not covered by those words.

Endlich, after having discussed the rules authorizing departures from a literal construction of statutes, says:

> But all these rules are to be understood as subject to the qualification, that, where the language is free from ambiguity, leads to no absurdity, and, hence, needs no interpretation, nothing beyond it can be regarded. (Endlich, sec. 27.)

The language, "greater or less or different" compensation, is plain and unambiguous and a literal construction can lead to no absurdity. The court below does not claim that such is the case, but bases its conclusion on the ground, as before said, of the injustice or hardship which, it is claimed, will result from a construction in harmony with the plain meaning of those words—a consideration, which, as we have seen, addresses itself solely to the law-making branch of the Government.

VII.

THE LAW, AS CONSTRUED IN THIS ARGUMENT, FOR THE MOST PART PROSPECTIVE IN ITS OPERATION.

Under the construction of the law contended for in this argument the contract was valid at its date and continued to be valid and binding up to the time when the law went into operation. Of the same character in this respect was the contract involved in *Bennett* v. *Woolfolk* (15 Ga. Rep., 213). In that case Bennett entered into a contract of partnership with the firm of D. & W. Gunn for the purchase and sale of slaves, the net profits to be divided, one-half to Bennett and one-half to the Gunns. The contract was made in September, 1843, and was then legal and remained so until December, 1843, when an act was passed in effect prohibiting the free introduction of slaves into the State of Georgia. During this period when the contract was legal—and, thereafter, up to May, 1846—a number of slaves were purchased and sold and the net profits were large. The proceeds of the sales were received by the Gunns and the suit was by Bennett to recover his half of the net profits. The court held that the contract was legal when entered into and remained legal until the passage of the act of December, 1843, and that Bennett was entitled to recover one-half of the net profits which accrued while the contract was legal.

To the same effect is the case of *Bradford* v. *Jenkins et al.* (41 Miss., 328, 335–337).

VIII.

THE IMPORTANCE OF THE CASE.

This case is believed to be one of very great importance—involving, as it does, the strict enforcement of the provisions of the law designed to maintain the published rates on file, and thus prevent discrimination and favoritism, and preserve, in the language of this court, "that equality of right which is the great purpose of the interstate-commerce act." (*I. C. C.* v. *Ry. Co.*, 167 U. S., 506.)

It is important not only because of the principle thus involved, but also because of the extent to which contracts of the kind in question have been entered into by railways throughout the country and under which transportation is being furnished. As before stated, the solicitor of the railway company sets forth in his motion to advance the case, as ground therefor, that "common carriers subject to the provisions of the commerce act have made *a large number of similar contracts* as to interstate transportation of both freight and passengers." In this connection it is further alleged in said motion—

> That such common carriers, being uncertain whether they (the contracts) are still in force or not, it is exceedingly important to all of them, *to the Interstate Commerce Com-*

> *mission, whose duty it is to enforce the provisions of the act,* to those holding such contracts with carriers, and to the public at large, to have the questions involved promptly and finally determined by this court.

It may be reasonably presumed that the prevalence of these contracts was one reason which influenced Congress to enact the provision of the law forbidding the charging or receiving by common carriers of a "greater or less or different compensation" than that specified in the tariffs on file.

Respectfully submitted.

L. A. SHAVER, *Solicitor.*

O

be set up and which is invalid under some law, or provision, of the Constitution of the United States.

The Circuit Court has no jurisdiction, in the absence of diverse citizenship, of a suit brought against a railroad corporation to enforce an alleged contract for an annual pass because, as stated in the bill, the refusal is based solely on the anti-pass provisions of the Hepburn Interstate Commerce Act of June 29, 1906, c. 3591, 34 Stat. 584.

The practice in such cases is to reverse the judgment and remit the case to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

THE appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the Circuit Court of the United States for the Western District of Kentucky against the appellant, a railroad company and a citizen of the same State. The object of the suit was to compel the specific performance of the following contract:

"Louisville, Ky., Oct. 2nd, 1871.

"The Louisville & Nashville Railroad Company in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released Company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said Company at Randolph's Station, Jefferson County, Ky., hereby agrees to issue free passes on said Railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter, to renew said passes annually during the lives of said Mottley and wife or either of them."

The bill alleged that in September, 1871, plaintiffs, while passengers upon the defendant railroad, were injured by the defendant's negligence, and released their respective claims for damages in consideration of the agreement for transportation during their lives, expressed in the contract. It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal to comply with the con-

tract was based solely upon that part of the act of Congress of June 29, 1906, 34 Stat. 584, which forbids the giving of free passes or free transportation. The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that if the law is to be construed as prohibiting such passes, it is in conflict with the Fifth Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the Circuit Court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court.

Mr. Henry Lane Stone for appellant.

Mr. Lewis McQuown and *Mr. Clarence U. McElroy* for appellees.

By leave of court, *Mr. L. A. Shaver*, in behalf of The Interstate Commerce Commission, submitted a brief as *amicus curiæ*.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. 584), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons, who in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful, is in

violation of the Fifth Amendment of the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the Circuit Court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. *Mansfield, &c. Railway Company* v. *Swan*, 111 U. S. 379, 382; *King Bridge Company* v. *Otoe County*, 120 U. S. 225; *Blacklock* v. *Small*, 127 U. S. 96, 105; *Cameron* v. *Hodges*, 127 U. S. 322, 326; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Continental National Bank* v. *Buford*, 191 U. S. 119.

There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution and laws of the United States." Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, the plaintiff, the State of Tennessee, brought suit in the Circuit Court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the State. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United

States, which forbids any State from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Gray (p. 464), "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company*, 188 U. S. 632, the plaintiff brought suit in the Circuit Court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the Circuit Court, the court saying, by Mr. Justice Peckham (pp. 638, 639).

"It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defence which the defendants might possibly set up and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defence and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defence is inconsistent with any known rule of pleading so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defence is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defence.

"Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

"The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defence of defendants would be and complainant's answer to such defence. Under these circumstances the case is brought within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454. That case has been cited and approved many times since, . . ."

The interpretation of the act which we have stated was first announced in *Metcalf* v. *Watertown*, 128 U. S. 586, and has since been repeated and applied in *Colorado Central Consolidated Mining Company* v. *Turck*, 150 U. S. 138, 142; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 459; *Chappell* v. *Waterworth*, 155 U. S. 102, 107; *Postal Telegraph Cable Company* v. *Alabama*, 155 U. S. 482, 487; *Oregon Short Line & Utah Northern Railway Company* v. *Skottowe*, 162 U. S. 490, 494; *Walker* v. *Collins*, 167 U. S. 57, 59; *Muse* v. *Arlington Hotel Company*, 168 U. S. 430, 436; *Galveston &c. Railway* v. *Texas*, 170 U. S. 226, 236; *Third Street & Suburban Railway Company* v. *Lewis*, 173 U. S. 457, 460; *Florida Central & Peninsular Railroad Company* v. *Bell*, 176 U. S. 321, 327; *Houston & Texas Central Railroad Company* v. *Texas*, 177 U. S. 66, 78; *Arkansas* v. *Kansas & Texas Coal Company & San Francisco Railroad*, 183 U. S. 185, 188; *Vicksburg Waterworks Company* v. *Vicksburg*, 185 U. S. 65, 68; *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company*, 188 U. S. 632, 639; *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, 63; *Joy* v. *City of St. Louis*, 201 U. S. 332, 340; *Devine* v. *Los Angeles*, 202 U. S. 313, 334. The application of this rule to the case at bar is decisive against the jurisdiction of the Circuit Court.

It is ordered that the

Judgment be reversed and the case remitted to the Circuit Court with instructions to dismiss the suit for want of jurisdiction.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* MOTTLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 37. Argued October 13, 1908.—Decided November 16, 1908.

The jurisdiction of the Circuit Court is defined and limited by statute; and, even if not questioned by either party, this court will, of its own motion, see to it that such jurisdiction is not exceeded.

A suit arises under the Constitution and laws of the United States, so as to give the Circuit Court jurisdiction on that ground, only when plaintiff's statement of his own cause is based thereon; that jurisdiction cannot be based on an alleged anticipated defense which may